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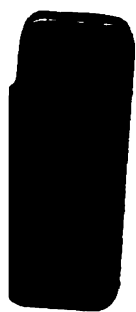
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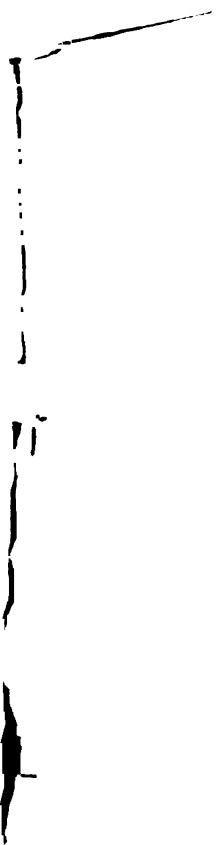
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SSN
JAM
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V.2

JSN
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UXJ
V.3



REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

Courts of Common Pleas

AND

Exchequer Chamber,

WITH

TABLES OF THE NAMES OF THE CASES AND THE PRINCIPAL
MATTERS.

BY JOHN BAYLY MOORE,

OF THE INNER TEMPLE, ESQ.

VOL. III.

CONTAINING THE CASES FROM HILARY TERM 59 GEO. III. TO
TRINITY TERM 59 GEO. III. 1819, BOTH INCLUSIVE.

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J U D G E S

OF THE

COURT OF COMMON PLEAS,

DURING THE PERIOD COMPRISED IN THIS VOLUME.

The Right Hon. Sir ROBERT DALLAS, Knt. Lord Chief Justice.

The Hon. Sir JAMES ALLAN PARK, Knt.

The Hon. Sir JAMES BURROUGH, Knt.

The Hon. Sir JOHN RICHARDSON, Knt.



A

TABLE

OF THE

CASES REPORTED

IN THE THIRD VOLUME.

The Cases which are printed in *Italics* were cited from *MS. Notes*.

A.					Page
Acton, Pain v.					605
Addey v. Woolley					21
Alban, tenant; Morrell, de-					
mandant; Hatchett, vou-					
chee					495
Allaston v. Hamley					606
Andrew v. Hancock					278
Anonymous					78
Anonymous					326
Archer v. Champneys					607
Arnold v. Edwards					317
Atkins v. Seward					601
B.					
Baldock, Woodham v. . . .					11
Barker, Parker v.					226
Barnes, vouchee; Orchard,					
tenant					20
Bartlett, Oliver v.					392
Bennett v. Kinnear					259
C.					
Biscoe, Parker v.					24
Blanchenay v. Vandenberg					643
Boehm v. Campbell					15
Bonfellow v. Steward					214
Bosanquet, Williams v. . . .					500
Bosworth v. Bosworth					590
Bosworth, Bosworth v. . . .					590
Bower v. Major					216
Bracebridge v. Johnson					237
Bradley, vouchee					577
Brewer, tenant; Shepherd,					
demandant; Shepherd,					
vouchee					673
Brown, Butler v.					327
Brown, Pincher v.					590
Bryan, De Warre v.					241
Burton, Martin v.					608
Butler, Brown v.					327
C.					
Calvert, Clark v.					96
Campbell, Boehm v.					15

TABLE OF THE CASES REPORTED.

	Page
Campbell, Lewis v.	33
Capper v. Des Anges	4
Carpenter v. White	231
Champneys, Archer v.	607
Chevalier v. Finnis	602
Christian, <i>ex parte</i>	578
Clark v. Calvert	96
Cleghorne v. Des Anges . . .	83
Clennell, plaintiff; Storer, deforciant	22
Cordery, Young v.	66

D.

Dalby v. Hirst	536
Darlam, Touissant v.	217
Day, Malcolm v.	579
Des Anges v. Priestly	246
De Warre v. Bryan	241
Doe, d. Elwood v. Roe	578
Doe, d. Jersey (<i>Earl</i>) v. Smith	339
Doe, d. Pitcher v. Mitchell .	229
Doe, Roe, d. Fenwick v. . . .	576
Doe, d. Spencer v. Reid . . .	96
Dorsey, Knight v.	305
Durell v. Mattheson	33
Dyson, Gorton v.	558

E.

Edwards, Arnold v.	317
Elwood, Doe, d. v. Roe . . .	578

F.

Fenwick, Doe, d. v. Roe . . .	576
Finnis, Chevalier v.	602
Fowler v. Luningborough (<i>Inhabitants</i>)	319
France v. Stephens,	23
Froude, Rex v.	645

G.

	Page
Gardner v. Harding	565
Girling, Wells v.	79
Godson v. Home	223
Gordon v. Mitchell	241
Gorton v. Dyson	558
Gray v. Milner	90

H.

Hale v. Small	58
Hall, Richardson v.	307
Hamley, Allastou v.	606
Hancock, Andrew v.	278
Hannaford, plaintiff; Pearce, deforciant	329
Harding v. Gardner	565
Hatchett, vouchee; Morrell, demandant; Alban, tenant .	495
Healy, Lee v.	76
Healy, Longworth v.	76
Hewlett, Watkins v.	211
Hickinbotham v Perkins . . .	185
Hirst, Dalby v.	536
Hodges v. Meek	240
Hodgson, Kirkus v.	64
Holder, Trotman v.	555
Home, Godson v.	223
Hotley v. Scott	368
Hull v. Pickersgill	612

I.

Idle v. Royal Exchange As- surance Company	115
---	-----

J.

Jameson v. Raper	65
Jenkins v. Mason	525

TABLE OF THE CASES REPORTED.

	Page
Jersey (<i>Earl</i>), Doe, d. v.	
Smith	339
Johnson, Bracebridge v.	237

K.

Kenrick, demandant; Owen, tenant; Owen, vouchee	70
Kinnear, Bennett v.	259
Kirkus v. Hodgson	64
Knight v. Dorsey	305

L.

Lee v. Healy	76
Lewis v. Campbell	35
Longworth v. Healy	76
Loningborough (<i>Inhabitants</i>), Fowler v.	319
Lovell, Neill v.	8
Lowe v. Robins.	757

M.

Macdonald, O'Langhla v.	77
Major, Bower v.	216
Malcolm v. Day	579
Marshall, Nind v.	703
Martin v. Burton	608
Martin v. Morgan	635
Mason, Jenkins v.	325
Mattheson, Durell v.	33
Meek, Hodges v.	240
Memoranda 1. 2.	564
Milner, Gray v.	90
Mitchell, Doe, d. Pitcher v.	229
Mitchell, Gordon v.	241
Morgan, Martin v.	635
Morland, Swain v.	740
Morrell, demandant; Alban, tenant; Hatchett, vouchee	495

	Page
Morrow, Saunders v.	671

N.

Neill v. Lovell	8
Nind v. Marshall	703

O.

O'Langhla v. Macdonald	77
Oliver v. Bartlett	592
Orchard, tenant; Barnes, vouchee	20
Owen, plaintiff; Owen, de- fendant	70
Owen, vouchee; Owen, ten- nant; Kenrick, demand- ant	70

P.

Page, Rex v.	656
Pain v. Acton	605
Parker v. Barker	226
Parker v. Biscoe	24
Pearce, Hannaford v.	329
Pearce, Thompson v.	260
Perkins, Hickinbotham v.	185
Phillipotts v. Reed	244
Pickersgill, Hull v.	612
Pincher v. Brown	590
Pitcher, Doe, d. Mitchell v.	229
Pratt, Rivers (<i>Lord</i>) v.	582
Priestly, Des Anges v.	246
Protheroe v. Thomas	3

R.

Raper, Jameson v.	65
Ray, Malcolm v.	222
Reed, Phillipotts v.	623
Reid, Doe, d. Spencer v.	96
Rex v. Froude	645

TABLE OF THE CASES REPORTED.

	<i>Page</i>		<i>Page</i>
Rex v. Page	656	Touissant v. Darlam	217
Ricardo, Windle v.	249	Trotman v. Holder	555
Richardson v. Hall	307		
Rivers (<i>Lord</i>), v. Pratt	582	U.	
Robins, Lowe v.	757		
Roe, Doe, d. Elwood v.	578	Uppill, Welch v.	330
Roe, d. Fenwick v. Doe	576		
Royal Exchange Assurance		V.	
Company Idle v.	115		
S.		Vandenbergh, Blanchenay v.	643
Saunders, Morrow v.	671		
Scott, Hatley v.	368	W.	
Seward, Atkins v.	601		
Shaw v. Summers	196	Watkins v. Hewlett	211
Shepherd, vouchee	673	Welch v. Uppill	330
Smith, Doe, d. Jersey (<i>Earl</i>), v.	339	Weller, Wilson v.	294
Sowerby, Brooks v.	157	Wells v. Girling	79
Spencer, Doe, d. v. Reid	96	White, Winter v.	674
Stephens, France v.	23	Williams v. Bosanquet	500
Steward, Bonfellow v.	214	Wilson v. Weller	294
Summers, Shaw v.	196	Windle v. Ricardo	249
Swain v. Morland	740	Winter v. White	674
Swinburne v. Swinburne	210	Woodham v. Baldock	11
Swinburne, Swinburne v.	210	Woolley, Addey v.	21
T.		Y.	
Thomas, Protheroe v.	3	Young v. Cordery	66
Thompson v. Pearce	260		

ERRATUM.

Page 339, line 6 of the marginal note, for "reversion," read "revocation."

C A S E S
ARGUED AND DETERMINED
IN THE
Courts of Common Pleas
AND
Exchequer Chamber,
IN
HILARY TERM,
IN THE
FIFTY-NINTH YEAR OF THE REIGN OF GEORGE III.

Memoranda.

On *Sunday* the 13th day of *December*, 1818, the Right .
Honourable *Edward*, Lord *Ellenborough*, Lord Chief
Justice of the Court of *King's Bench*, where he had pre-
sided sixteen years, died at his house in *St. James's*
Square.

In the course of the last vacation, *William Draper Best*, Esq., one of His Majesty's Serjeants learned in the Law, and Chief Justice of *Chester*, was appointed one of the judges of the Court of *King's Bench*. And

John Richardson, Esq. of the *Middle Temple*, having been first called to the degree of Serjeant at Law, was appointed one of the justices of the court of Common Pleas, and accordingly took his seat on the bench on the first day of this term. He gave rings with the motto, "*More Majorum*."

Mr. Serjt. *Copley* was appointed to the office of Chief Justice of *Chester*, in the room of Mr. Serjt. *Best*, and, together with Mr. Serjt. *Pell*, was made King's Serjeant.

Giffin Wilson, of *Lincoln's Inn*, Esq., *Michael Nolan*, of *Lincoln's Inn*, Esq., and *Stephen Gaselee*, of *Gray's Inn*, Esq. were appointed His Majesty's Counsel learned in the Law. And

Robert Matthew Casberd, of the *Middle Temple*, Esq., received a patent of precedence.

In this term, *Vitruvius Lawes*, of the *Inner Temple*, *John Cross*, of *Lincoln's Inn*, and *John D'Oyley*, of the *Middle Temple*, Esqrs. were called to the degree of Serjeants at Law. They gave rings with the motto, "*Pro Rege et Lege*,"

PROTHEROE v. THOMAS.

Monday,
January 25.

Mr. Serjt. *Pell*, on the authority of *Elwood v. Sir Godfrey Kneller* (a), moved, that Mr. *Rigby*, jun., should be required to make an affidavit, or be examined on interrogatories, to enable the prothonotary to decide on a point as to the taxation of a bill of costs which had been referred to him as to Mr. *Pitcher*, the solicitor, having been retained at the instance of *Rigby*, sen. The case came before the prothonotary, under the following circumstances :

The court will not require the attendance of a third person before the prothonotary in the taxation of a bill of costs, which had been referred to him to assist a master in Chancery, to whom the reference had been previously given.

A bill in *Chancery* by the name of *Rigby v. Edwards*, had been referred to one of the masters of that court for taxation; when it was found that the costs attending the present action were also included in that bill; that the master, having completed the taxation of all the *Chancery* costs contained in such bill, had applied to one of the prothonotaries for his assistance to tax that part of it which related to fees in this court; that the parties duly attended before him, when the only question was, whether *Pitcher*, the attorney, for the defendant in this action, had been engaged as solicitor for the plaintiff, *Rigby*, in the Court of *Chancery*. An affidavit made by him, stating that he had been retained by *Rigby*, was laid before the prothonotary. In answer to this, *Rigby* swore generally, but not positively, that he never intended to retain *Pitcher* as his solicitor. The prothonotary, therefore, thought it was necessary that *Rigby's* son should attend him, to

(a) 1 Str. 477.

1819.

PROTHEROE
v.
THOMAS.

prove whether *Pitcher* had been retained by his father, or not. But

The court observed, that they had no jurisdiction to interfere, as it appeared that the original proceedings had taken place in the Court of *Chancery*, and that a reference had been previously made to one of the masters for taxation; that the assistance required of the prothonotary merely placed him in the situation of an assessor to the master, to whom the reference had been primarily given.

The learned serjeant, therefore, took nothing by his motion.

Monday,
Jan. 25.

CAPPER v. DESANGES and another.

Two traders in partnership left their shop, and told their shopman that they were going out to endeavour to get some bills of exchange discounted, and directed him to say that they were not in the way, or to make some excuse for them, in case a creditor should call. On that and the following day a creditor called, when they were both at home, and desired to see either the one or the other of them, when the shopman denied them without being authorised by them so to do. *Held*, that the jury were warranted in concluding that they absented themselves with an intent to delay their creditors.

THIS was an action brought against the defendants as the sheriffs of London, for a false return of *nulla bona*; and, at the trial of the cause before Lord Chief Justice *Dallas*, at *Guildhall*, at the sittings after the last term, the only question was, whether a prior act of bankruptcy overreached the writ of execution which had been sued out. The act of bankruptcy relied on was this: Two persons, by the name of *Reed* and *Baker*, carried

on the business of linen-drappers, as partners, in *High Street, Bloomsbury*. In the morning of the 13th of *March* last, they both came into the shop, and *Reed* said to *Baker*, that they must be off to endeavour to get some bills of exchange discounted, and told the shopman to say that they were not in the way, or to make some excuse for them, in case a creditor should happen to call. Both of them then went out together. *Baker* was in the habit of coming to the shop early in the morning, and staying a short time, but was absent during the remainder of the day. *Reed* lived in the house, and returned on the day in question, about two hours after his absence with *Baker*, who did not return until the following morning. During their absence, a person by the name of *Mainwaring* called, who had a separate account with *Baker*, he being indebted to him for ironmongery, furnished for his house in *Tottenham Court Road*. *Mainwaring* had also furnished a Bath stove on account of both the bankrupts, the bill for which had not been sent in. On the 14th of *March* it appeared that both the bankrupts were at home, and *Mainwaring* called again, and asked to see either the one or the other of them. The shopman denied them, as there had been a dispute between the bankrupts, occasioned by *Baker's* having incurred a number of debts on his own account. They had not requested the shopman to deny them on that day, but he did it on his own judgment.

His lordship left it to the jury to determine whether the bankrupts departed the shop on the 13th of *March*, with an intention to evade their creditors, or for the purpose of getting bills discounted. They thought that an act of bankruptcy had been committed by leaving the shop, and consequently found a verdict for the plaintiff, with liberty to move to set it aside if the court should

1819.

 CAPPEN
 v.
 DESANGES.

1819.

CAPPER

v.

DESANGES.

be of opinion that no act of bankruptcy had been committed.

Mr. Serjt. *Copley* now moved for a rule *nisi*, that this verdict should be set aside; and a nonsuit entered, or a new trial granted. He contended that *Mainwaring*, having called for his account on the 13th of *March*, could only have called for the amount of the iron-mongery furnished to *Baker* on his own account, as no bill had been delivered for the stove which had been sent in on the joint account of the bankrupts; that, as they were both out on that day, for the purpose of getting bills of exchange discounted to satisfy the demands of their creditors, it could not amount to an act of bankruptcy; and that, as no express order of denial was given, either on that or the subsequent day, to the shopman, it could not be considered as a departure from the house to evade the demands of their creditors.

Lord Chief Justice DALLAS.—It was proved at the trial that, on the 13th of *March*, *Mainwaring* came to the bankrupts' shop and inquired for both of them. It does not, therefore, appear that he came for payment of the separate account due to him from *Baker*, as he said he would feel obliged if either one of them would pay it. I left it to the jury to consider with what intent the bankrupts left their shop on the 13th of *March*. They said they must go out, for the purpose of endeavouring to get some bills discounted; and told the shopman, if any one called, either to say they were not in the way, or to make some other excuse for them. No further evidence was adduced of their being out for any special or particular purpose; although, therefore, they might have left the shop on the 13th, for the purpose of accelerating

their payments by obtaining discounts, still they desired their shopman to make any excuse he might think proper for them, in case a creditor should call. As *Mainwaring* asked for both the bankrupts on the subsequent day, the shopman thought, as he was ordered to deny them on the 13th, he might still be justified in so doing on the 14th. Besides this, no evidence was adduced that they had procured any bills to be discounted on the 13th; and on the following day, one of the bankrupts said that they had no money left to pay any one. The jury might, therefore, presume that *Mainwaring* called on the 13th for the settlement of the joint account; and that both the bankrupts left their shop for the purpose of delaying their creditors.

1819.
CAPPER
v.
DESANGES.

Mr. Justice PARK.—No direct or positive proof was adduced at the trial that the bankrupts left their shop on the 13th of *March*, for the purpose of getting bills of exchange discounted. If they had gone out for that purpose, it was quite unnecessary for them to have directed their shopman to make an excuse in case a creditor should call. Added to this, they were informed that they had been denied on the 14th, and did not object to it. I am, therefore, of opinion that the Lord Chief Justice left it very properly to the jury; and that they, under the circumstances, have drawn a right conclusion. The bankrupts having said to their shopman, on the 13th, that if any one should call he was to make an excuse for them, it might be very fairly inferred that they had no money. The denial given by the shopman, on the subsequent day, must be also taken into account; for, when *Mainwaring* called on that day, he had received no countermand of the order of denial given on the day previous; and as they were both at home on the 14th, this might be considered as an approval of the denial.

1819.

 CAPPER
 v.
 DESANGES.

Mr. Justice BURROUGH.—I think the jury have drawn a right conclusion, and were justified under the circumstances in finding that both the bankrupts had committed an act of bankruptcy. It appeared they went out in order to get some bills discounted, but no proof was adduced that they did so, nor was any evidence given whether they had any bills to be discounted or not.

Mr. Justice RICHARDSON.—The intent of the departure of the bankrupts on the morning of the 13th of *March*, was a fact for the jury to determine; and I think they have drawn a correct conclusion.

Rule refused.

Tuesday,
 Jan. 26.

NEILL v. LOVELESS.

If a defendant surrender in discharge of his bail, in the vacation after final judgment, the term in which such judgment is signed, is one of the two terms in which the plaintiff must charge him in execution.

MR. Serjt. *Vaughan*, on the first day of this term, had obtained a rule *nisi*, that the defendant should be discharged out of the custody of the warden of the Fleet. It appeared that final judgment was signed against him in *Trinity* term last, and that he surrendered himself in discharge of his bail in the following vacation: that a notice of render was served on the plaintiff on the 28th of *August* last, and that he did not charge the defendant in execution till after the expiration of the last term. The learned serjeant contended, on the authority of *Smith v. Jefferys (a)*, that *Trinity* was to be reckoned as one of

the two terms in which he should have been charged in execution; and that he was therefore entitled to be discharged.

1819-
NEILL
v.
LOVELLASS.

Mr. Serjt. *Pell* now shewed cause, and insisted that there was no pretence for the application, as one of a precisely similar nature was made in this case on summons before Mr. Justice *Burrough* in the course of the last month, who refused to make any order; and that it had been decided that this court would not re-hear or over-rule a case which had been heard by a judge at chambers. With respect to the time of charging the defendant in execution, that the rule (a) embraced two branches; the one where the defendant is in custody, and the other where he renders himself in discharge of his bail: that the latter was applicable to this case, and that the plaintiff therefore might charge the defendant in execution within two terms next after judgment.

Lord Chief Justice DALLAS.—If my brother *Burrough* had made an order, the court would not interfere; but as he refused to do so, the party is left precisely in the same situation as he was before. The decision adverted to by my brother *Pell* was made in the case of *Blandford v. Champneys*, which came before the court in the course of the last term, having previously been before Mr. Justice *Burrough* at chambers, and is not in point, for it was originally before the court, and towards the end of the term was agreed to be heard at chambers; and the judge was therefore substituted for the court. With respect to the construction of the rule of the 8th Geo. 1., I think we must be governed by that laid down by the court of

(a) *Easter*, 8 Geo. 1.

1819.

NEILL

v.

LOVELASS.

King's Bench in the case of *Smith v. Jefferys*; and therefore this rule must be made absolute.

Mr. Justice PARK.—The case of *Smith v. Jefferys* came before Mr. Justice *Lawrence* at chambers, who made an order for a supersedeas, on which the defendant was discharged out of custody; and which by the terms of this rule is now sought to be done here. The learned judge in that case took great pains in the construction of the rule of *Hilary* 26th *Geo.* 3., which is in terms precisely similar to that of the 8th *Geo.* 1., and he there drew the distinction between the application of that rule to a surrender after verdict or after judgment; that distinction has since prevailed; and I therefore think the defendant is entitled to his discharge.

Mr. Justice BURROUGH concurred.

Mr. Justice RICHARDSON.—The terms of the rule of the 8th *Geo.* 1. provide for two cases; the one before and the other after judgment is obtained: and it was decided in the case of *Smith v. Jefferys*, that when the defendant surrenders in the vacation after final judgment, the term in which judgment is signed is reckoned as one of the terms in which the plaintiff must charge him in execution; and Mr. Justice *Lawrence*, in drawing the distinction between the surrender being made after verdict or judgment, said, that it also prevailed in the practice of this court. I therefore perfectly concur in thinking that this rule must be made

Absolute (a).

(a) See the above rules, 1 *Tidd*, 6th edit. 360, 361, and the cases there referred to.

WOODHAM and Another v. BALDOCK.

Wednesday,
Jan. 27.

THIS was an action of trespass brought to recover from the defendant, as sheriff of the county of *Kent*, the value of some household furniture, and other goods, taken in execution, and sold by him under a *feri facias*, issued at the suit of one *Samuel Matterson*, against *Thomas Fowler*, who was formerly a baker at *Plumsted*. The plaintiffs claimed the property, as trustees under a deed of assignment made by *Fowler*, in 1817, for the benefit of his creditors.

At the trial of the cause before Lord Chief Justice *Dallas*, at *Guildhall*, at the sittings after the last term, the execution of the deed of trust was admitted; and it was proved that the trustees put up to sale by public auction the goods of *Fowler*, which were on his premises at *Plumsted*, reserving those which were the subject of this action, and left by them in the possession of *Fowler*, and prior to the sale removed by him, with the consent of the trustees, from *Plumsted* to *Woolwich*, where he continued in possession till the execution in *June*, 1818. It was not stated at the sale at *Plumsted* that the property belonged to the trustees, but in the advertisement and catalogue it was described to be the property of *Fowler*, removing from *Plumsted* to *Woolwich*. There was a provision in the trust-deed to enable the trustees to permit *Fowler* to have the use and enjoyment of such parts of the stock and other effects as they might think fit, until the debts due to him were collected, and the other property converted into money. The sale at *Plumsted* took place in *March*, 1817, and the defendant continued in possession of the goods at

By the terms of a trust-deed for the benefit of creditors, the trustees were empowered to permit the insolvent to have the use of such part of his effects as they might think fit, until the debts due to him were collected; part of his property was sold by public auction, and described as the property of the insolvent removing from A to B: Held, that such sale was sufficient notice of a change of property in the goods, and that the insolvent's keeping possession of the remainder at B for twelve months after the sale, was within the terms of the deed.

1819.
 ~~~~~  
 WOODHAM  
 v.  
 BALDOCK.

*Woolwich* until the time of the execution: *Matterson* had become a security, and advanced money on *Fowler's* account, on which the latter gave him a receipt for all his interest, stock, furniture, &c. that belonged to him at *Woolwich*.—Under these circumstances, his lordship was of opinion that the sale of *Fowler's* property at *Plumsted* was notice of a change of property in the goods, and left it to the jury to determine whether there was any fraud in the deed of trust; which they found in the negative, and accordingly gave a verdict for the plaintiffs.

Mr. Serjt. *Vaughan* now moved for a rule *nisi*, that this verdict might be set aside and a new trial granted; on the grounds that the sale at *Plumsted* was not a proper notice of the change of property; as it appeared by the catalogue, that so far from being a sale under the deed of trust, the goods were described to be the property of the insolvent, *Fowler*; and the reason assigned for selling was, that he was removing from *Plumsted* to *Woolwich*, and that, consequently, there was no semblance of insolvency. If the trustees had allowed *Fowler* to remain a reasonable time in possession, it would be within the terms of the deed, but as the sale took place in *March*, 1817, and *Fowler* had continued in possession until the execution, it was sufficient evidence of fraud to avoid the bill of sale. This case differs from that of *Kidd v. Rawlinson* (a), as there the property was bought in, and re-let to the original owner; but here the trustees took possession of no part of the property that was sold at *Plumsted*, or of that which was removed by *Fowler* to *Woolwich*. In *Leonard v. Baker* (b), the sale was notorious, and the property changed; and it was also known that it had

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(a) 2 Bos. and Pul. 39.

(b) 1 Meule and Sel. 251.

been assigned to trustees for the benefit of creditors : if it had been advertised here as the property of the trustees, it would be a sufficient notice of the change. The receipt given by *Fowler* to *Matterson* expressed that the property was his own, and was given subsequently to *Matterson* having become a security for him. The assignment was fraudulent, because the trustees had not taken possession, and as the goods were sold as being the property of *Fowler*, the cases of *Kidd v. Rawlinson*, and *Leonard v. Baker*, do not apply.

1819.  
WOODHAM  
v.  
BALDOCK.

Lord Chief Justice DALLAS.—The facts of this case are these : The plaintiffs were trustees of *Fowler*, under a deed of assignment, for the benefit of his creditors ; they were, therefore, in the virtual possession of his property : by the terms of the deed *Fowler* might remain in possession, for the purpose of carrying on his trade until the debts due to him were collected, and the other property converted into money for the benefit of his creditors. My brother *Vaughan* has admitted, that if he had remained in possession a reasonable time, it would be within the terms of the deed ; it was left to the jury whether this deed were fraudulent or not, and they determined in the negative. This deed was made for the benefit of *Fowler's* creditors ; the property, therefore, belonged to the plaintiffs, and *Matterson* took a security on the property, knowing it to be so, and it appeared that *Matterson* had notice that the property taken was the property of the trustees before he gave *Fowler* any credit : for before any goods were furnished to him, he asked him what security he could give. I therefore think there is no reason to disturb the verdict of the jury.

Mr. Justice PARK.—This case does not turn on the statute 21 Jac. 1. cap. 19., but merely embraces a ques-

1819.  
WOODHAM  
v.  
BALDOCK.

tion on the 19th *Eliz.* cap. 5. Is this deed, therefore, under the circumstances, fraudulent? If an original owner be left in possession of property, it is a badge of fraud; but *Fowler's* remaining in possession was perfectly consistent with the terms of the deed; for the trustees were empowered to allow him to remain in possession a reasonable time: this case, therefore, does not depend on the general notice; but it appears, that before any goods were furnished to *Fowler*, on the guarantee of *Matterson*, he asked him for a security. As the jury have found that there was no fraud, I think this rule ought not to be granted.

Mr. Justice BURROUGH.—The only question is, whether, in this case, the possession was consistent with the terms of the deed? and, under the circumstances, I am clearly of opinion that it was.

Mr. Justice RICHARDSON.—This is a question on the statute of *Elizabeth*, and the only difficulty is, whether *Matterson* had notice of the trust-deed before he had dealings with *Fowler*. Questions of this sort depend more on fact than law. If *Matterson* had notice that the property belonged to the trustees, the deed was not fraudulent: the evidence as to this point was left to the jury; and it was clearly in their province to decide.

Rule refused.

## BOEHM v. CAMPBELL.

Wednesday,  
Jan. 27.

THIS was an action of *assumpsit* on a guarantie. The first count of the declaration stated, that the plaintiff carried on trade under the style and firm of *Boehm & Co.*, and that at the time of making the bill of exchange thereafter mentioned, Messrs. *Sawyer, Tobler, & Co.* were indebted to him in a large sum, *to wit*, the sum of £1026 : 7s. : 6d., for goods before then shipped, sold, and delivered by him to *Sawyer & Co.*, and for money advanced and paid by the plaintiff for their use, on their account, and at their request, of which the defendant had notice; and that in consideration of the premises, and in consideration that the plaintiff would give to *Sawyer & Co.* time for the payment of the money so due to the plaintiff, until a certain period agreed on, and would, as a security for such payment, take a certain bill of exchange, to be drawn by him in his firm of *Boehm & Co.* upon Messrs. *Sawyer & Co.*, to bear date the 1st of *August*, 1818, for payment three months after date, to the order of the plaintiff for £1026 : 7s. : 6d., and to be accepted by *Sawyer & Co.*, and by such acceptance to be made payable at the house of Messrs. *Sykes & Co.* the defendant undertook and promised the plaintiff to guaranty the payment of the same bill, should it be dishonoured by the acceptors. The plaintiff then averred, that he, confiding in the undertaking of the defendant, did give *Sawyer & Co.* time for payment of the money due from them to him for the period aforesaid, and as a security for such payment took the said bill of exchange, which was afterwards drawn, accepted, and made payable by the defendant, and made the defendant liable by the statute of frauds to bind the defendant for the payment of the goods.

The plaintiff being a merchant abroad, was in the habit of dealing with J. S., and having shipped goods for him to the amount of 1026*l.*, suspecting his solvency, requested the defendant to enter into a guarantie for the payment of the above sum, when he wrote a letter addressed to the plaintiff, stating, "that J. S. having accepted a bill drawn on him by the plaintiff for 1026*l.* he gave his guarantie for the due payment of the same, in case it should be dishonoured by the acceptor:" Held, that this was a sufficient agreement within the 4th section of

1819.  
 {  
 BOEHM  
 v.  
 CAMPBELL.

able in manner aforesaid. The plaintiff then averred, that he indorsed the bill to Messrs. *Sillau & Co.*, and that when it became due they presented it for payment at Messrs. *Sykes & Co.*, who refused to pay the same; and that it was afterwards duly protested and returned to the plaintiff, who paid its amount to Messrs. *Sillau & Co.* The second count was similar to the first, except that it omitted that the plaintiff agreed to give *Sawyer & Co.* time for payment, and stated the consideration to be, that the plaintiff would, in payment of the said last mentioned sum so due to him, take a bill of exchange, to be drawn and accepted as in the first count; and that it was afterwards so drawn, accepted, and made payable, as aforesaid. There were three other special counts, varying the consideration and promise.

At the trial of the cause before Lord Chief Justice *Dallas*, at *Guildhall*, at the sittings after the last term, it appeared that the plaintiff, who was a merchant at *Antwerp*, was in the habit of dealing with *Sawyer & Co.*, and having shipped corn for them to the amount of £1026 : 7s. : 6d., and holding their acceptance for £999 : 17s. : 6d., and suspecting their solvency, the defendant was requested to enter into a guarantie for the payment of the above sum, when he wrote the following letter;—

Messrs. *Boehm and Co. Antwerp.*

*London, 14th August, 1818.*

" Gentlemen,

" Our mutual friends, Messrs. *R. J. Sawyer and Co.* having accepted the underwritten bill drawn on them by your firm, I hereby give my guarantie for the due payment of the same, should it be dishonoured by the acceptors."

*Copy of the bill above guaranteed.*

*Antwerp, 1st August, 1818.*

Sterling £1026:7s.:6d.

Three months after date, pay to our order one thousand and twenty-six pounds, seven shillings, and sixpence, value in account as advised by

*Boehm and Co.*

To Messrs. *R. J. Sawyer and Co. Leadenhall Street.*

*Accepted at Messrs. Sykes and Co.*

*R. J. Sawyer and Co.*

1819.

BOEHM

v.

CAMPBELL.

When this bill became due, it was dishonoured, Messrs. *Sawyer and Co.* having before stopped payment, and the defendant on application being made to him refused to pay its amount. It also appeared that the body of the bill and the acceptance were written in *London*, and that the plaintiff's name was originally written in pencil there, and afterwards signed by him at *Antwerp*, when it was objected for the defendant, *first*, that the bill required a stamp, as it was drawn in *London*; *secondly*, that no consideration from the plaintiff to the defendant was expressed on the face of the guarantie; and, *thirdly*, that the declaration did not apply to the defendant's undertaking, as it was averred that the bill was drawn, accepted, and made payable after the defendant's promise, whereas his letter of guarantie referred to a bill then in existence. His lordship over-ruled the first and last objections, but saved the point as to whether the consideration was sufficiently expressed on the face of the defendant's letter, subject to which the jury found a verdict for the plaintiff.

Mr. Serjt. *Vaughan* now moved for a rule *nisi*, that this verdict should be set aside and a nonsuit entered,

1819.  
 BOEHM  
 v.  
 CAMPBELL.

and contended on the authority of *Wain v. Warlters* (a), that the promise of the defendant was a *nudum pactum*, and that the plaintiff therefore was not entitled to recover. That in *Morris v. Stacey* (b), Lord Chief Justice Gibbs said, that it was not necessary in that case to over-rule the decision in *Wain v. Warlters*, and that as here no consideration was expressed on the face of the instrument, it came expressly within the latter case.

Lord Chief Justice DALLAS, after reading the defendant's letter containing the guarantie, observed, that this case was similar to that of *Morris v. Stacey*, namely, that in consideration that the plaintiff would forbear to sue *Sawyer & Co.*, and take a bill drawn on, and accepted by them, the defendant undertook to guaranty its payment if it should be dishonoured by them. This was sufficiently set out in the declaration. The jury were satisfied that no fraud had been practised. The bill being partly completed here, was sent to the plaintiff at *Antwerp* for his signature as drawer, and consequently did not require an English stamp, for it was not a bill of exchange until the drawer's name was affixed to it, *Snaith v. Mingay* (c). In *ex parte Minett* (d), Lord Eldon expressed serious doubts of the propriety of the decision in *Wain v. Warlters*, and in *ex parte Gardom* (e), his Lordship decided against the rule as laid down by the Court of *King's Bench*; but we see no reason at present to express an opinion on the case of *Wain v. Warlters*, as this case must be governed by that of *Morris v. Stacey*.

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(a) 5 East, 10. (b) 1 Holt, Ni. Pri. 153. (c) 1 Maule & Sel. 87. (d) 14 Vesey, Jun. 189. (e) 15 Vesey, Jun. 286.

Mr. Justice PARK concurred.

1819.

BOEHM  
v.  
CAMPBELL.

Mr. Justice BURROUGH.—The agreement of the defendant in writing to guaranty the payment of the bill, in case it should be dishonoured by the acceptors, was, I think, quite sufficient.

Mr. Justice RICHARDSON.—This case may be distinguished from that of *Wain v. Warlters*, where it was held that the consideration for the promise, as well as the promise itself must be in writing. Here there was an existing debt due to the plaintiff from *Sawyer & Co.* He, doubting their solvency, not only drew a bill on them for their acceptance, but required the guarantie of the defendant in case it should be dishonoured by them. That therefore discloses the nature of the contract, and it is sufficiently expressed in the declaration. The statute of frauds (a) merely requires the agreement on which the action is brought, or some memorandum or note thereof, to be in writing and signed by the party to be charged therewith; if the intent of the parties be expressed, it is sufficient. The consideration on which this action was founded, was for the plaintiff, who was the creditor of Messrs. *Sawyer & Co.*, to give them time for the payment of a debt due to him, and I therefore think that the letter of guarantie given by the defendant for this purpose, was sufficient.

Rule refused.

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(a) 29 Car. 2. c. 3. s. 4.



Wednesday,  
January 27.

———, demandant, ORCHARD, tenant, BARNES,  
vouchee.

The court will not allow a recovery to be amended by inserting a parish, if the property in the deed to lead the uses be described as a rectory, although such rectory may extend to more than one parish.

MR. Serjt. *Lens* moved that this recovery might be amended, by inserting the parish of *Hapton*; in the deed to lead the uses, the property was described as the rectory of *Hudenall*, together with all rights, glebes, &c. Part of the rectory lay in the parish of *Hapton*, and a part of the glebe lands was also situate in that parish, and the other part was in the parish of *Hudenall*. He observed that the description of the property in the deed was sufficient to embrace the parish of *Hapton*; but that the title was objected to by a purchaser, as it did not appear that the rectory extended to that parish.

Lord Chief Justice DALLAS.—The question is, whether an amendment be requisite in this case? If not, the court ought to lean against its being made. I think the term rectory is sufficient to pass all the property, that the recovery, therefore, is neither erroneous nor defective, and that consequently no amendment is necessary.

Mr. Justice BURROUGH.—The whole of the premises might be recovered in an action of ejectment under this description; for the term rectory is not confined to one parish, and the rector of one parish very frequently has tithes from another.

Mr. Justice PARK, and Mr. Justice RICHARDSON, concurring, the amendment was

Refused.

ADDEY and another, v. WOOLLEY and another.

Thursday,  
January 28.

THIS was an action of debt brought by the plaintiffs, as overseers of the poor of the parish of *Marey*, on a bond given by the defendants to indemnify that parish against the expenses which might be incurred by the birth of an illegitimate child. The defendants pleaded that the plaintiffs were not overseers, nor was either of them overseer, of the poor of that parish, at the time of the commencement of this suit. To this plea there was a general demurrer and joinder.

By the 54 *Geo.* 3, c. 170, s. 8, an action on a bond to indemnify a parish against the expenses of a bastard child, must be brought in the names of the overseers for the time being, and not of those to whom the bond was given.

Mr. Serjt. *Copley*, for the plaintiffs.—This case depends entirely on the construction of the 54 *Geo.* 3, c. 170, s. 8. (*a*); and the only question is, whether the right of action is vested in the overseers for the time being, or in those to whom the bond was given? The bond here was given to the present plaintiffs, who were not in office at the time the action was brought; but still they are not precluded from suing the defendants; for the statute does not prevent them from their right of action.

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(*a*) By which it is enacted, "That all securities given or received, or thereafter to be given, for indemnifying any district or parish, for the maintenance of any bastard child or children, or any expenses in any way occasioned by such district or parish, by reason of the birth or support of any bastard child or children born within such district or parish, or chargeable thereto, it shall be, and the same are thereby declared to be vested in the overseers of the poor of such district or parish for the time being; and that it shall be lawful for the overseers of such district or parish to sue for the same, as and by their description of overseers of such district or parish; and that such action so commenced should in no ways abate by reason of any change of overseers of such district or parish pending the same, but should be proceeded in by such overseers for the time being, as if no such change had taken place."

1819.  
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 ADDEY
 v.
 WOOLLEY.

Mr. Serjt. *Blosset*, *contra*, was stopped by the court.

Lord Chief Justice DALLAS.—From the construction of the 8th sect. of the 54 Geo. 3, I have no doubt but that the action should have been brought in the names of the overseers for the time being.

Mr. Justice PARK concurred.

Mr. Justice BURROUGH.—I remember reserving a similar point for the opinion of the judges, which came before me, on the construction of another act of parliament. It was an indictment for felony; and they held that the property should be laid in the names of the overseers for the time being, and not in the names of those who were in office at the time the offence was committed.

Mr. Justice RICHARDSON.—The statute 54 Geo. 3, particularly specifies that all securities given to indemnify a parish for the maintenance of illegitimate children, shall be vested in the overseers for the time being. I, therefore, think that they alone are entitled to sue.

Judgment for the defendants.

Friday,
 January 29.

CLENNELL, plaintiff, STORER, deforciant.

If the parish of A. be written on an erasure in the deed to lead the uses of a fine, the court will allow it to be substituted for B. on an affidavit that the latter parish was inserted by mistake, and that the parish of A. was written on the crasure before the deed was executed.

Mr. Serjt. *Hullock* moved that this fine might be amended, by substituting the parish of *Allington* for that of *Rothbury*. It appeared that the object of the fine was to pass

lands in the former parish, which was written on an erasure in the deed to lead the uses. On his producing an affidavit, which stated that the parish of *Rothbury* was inserted by mistake, and that it was erased, and the parish of *Allington* written on the erasure before the execution of the deed, the court allowed the

1819.
 CLENNELL
 v.
 STORER.

Amendment.

FRANCE, the younger, v. STEPHENS.

Friday,
 January 29.

Mr. Serjt. *Vaughan* moved for leave to issue a *distringas* to compel the appearance of the defendant in this case, on an affidavit of a sheriff's officer, which stated that he went to the defendant's house; and that, on asking for him, he was informed by his wife that he was not at home; that he then asked her if the defendant was absent for fear of his creditors, to which she answered in the affirmative, and that she did not know when to expect his return, nor did she know where he was; and that she would give the officer five guineas if he would discover him, and let her know where she might find him.—The ground on which he rested his application was, that the declaration of the wife, that her husband was absent for the purpose of avoiding his creditors, was sufficient; and more particularly so, as the defendant's absence was notorious to all his neighbours; and that he was believed in the neighbourhood to have absconded for the purpose of avoiding an arrest, or being served with process, and that the trade was carried on in his absence by his wife. But

The court will not grant a *distringas* to compel an appearance, on an affidavit which stated that the defendant's wife said that her husband was absent from his house for fear of his creditors; on the ground that the declaration of the wife ought not to prejudice the husband.

1819.
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 FRANCE  
 v.  
 STEPHENS.

The court held that the declaration of the wife ought not to prejudice the husband, and that the officer's merely going to the defendant's house was not sufficient, and that he had not sworn that the defendant was ever seen at the house, or that he lived there, and that as this affidavit could not be read in evidence against him, either to make him a bankrupt, or for any criminal purpose, they

Refused the rule.

Wednesday,  
 Feb. 3.

PARKER and Another, v. BISCOE.

A fine levied by a testator subsequent to his will, operates as a revocation of such will.—A. by will devised all his real estates, save and except certain copyhold estates therein mentioned in trust for his eldest son, with remainder to preserve contingent remainders, with remainder to the male issue of his son in tail male, with remainder over; and afterwards made a codicil, whereby, after reciting that by the death of his brother he had become entitled for life to certain estates mentioned in the will of J. S., he revoked the limitation in his will, so far as it related to his estates in favor of his son, and declared that a proviso, contained in his will for that purpose, should be extended so as to comprehend the estates limited by the will of his brother, as well as those limited by the will of J. S., and for preventing the estates mentioned in his will from going with those limited by the will of his brother, as was provided in his will as to the estates limited by the will of J. S.: *Held* that such codicil did not amount to a republication of his will; neither did it amount to a devise by implication, or a confirmation of the devise of lands contained in his brother's will.—A fine levied to pass all lands in the parish of C. is sufficient to comprehend the manor of W. within that parish, although such manor was not mentioned in the fine.

or before a given day, on having a good title to the premises. The defendant pleaded the general issue, and at the trial before Lord Chief Justice *Gibbs*, at *Westminster*, at the sittings after *Easter* term, 1817, the sufficiency of the title tendered by the plaintiffs being the only point in dispute between the parties, a verdict was taken for them, with nominal damages, subject to the opinion of the court as to the sufficiency of such title, upon a case of which the following is the substance.

1819.  
 PARKER  
 v.  
 BISCOE.

Sir *John Whalley Smythe Gardiner*, bart., by indentures of lease and release, dated in *July*, 1787, executed upon his marriage with Miss *Martha Newcome*, settled certain hereditaments, situate at the above parishes, to the use of himself and his heirs till marriage, then to the use of himself for life, and after his decease to the intent, that in case his intended wife should survive him, she should have for life an annuity of £800, in lieu of dower, with the usual powers of entry, distress, and perception of profits; and subject thereto, to the use of *George Gostling* and *Henry Newcome*, therein named, their executors, &c. for ninety-nine years, to commence from the decease of the said Sir *John W. S. Gardiner*, in trust for better securing the said annuity of £800, with remainder to the use of him, his heirs, and assigns.—There is a hamlet in the parish of *Cuddesdon*, called *Wheatley*, and a manor by reputation called the manor of *Wheatley*, which extends over the whole hamlet; but there are no copyhold tenants within *Wheatley*, nor any freehold tenants holding of the said manor. Sir *John W. S. Gardiner*, at the time of this settlement, was seised in fee of the whole of the estates in question. By his will, dated 13th of *April*, 1795, and duly executed to pass real estates, after directing his debts to be paid, and bequeathing pecuniary legacies, he devised his estate at *Tackley* to his wife for life, and also gave

1819.  
 PARKER  
 v.  
 BISCOE.

her an annuity of £200, in addition to the £800 to which she would be entitled by the settlement, in case she survived him, and charged the additional annuity upon all his lands within *Tackley, Cuddesdon, and Denton*; and after the death of his wife he devised all his lands in those three parishes, subject to the two several annuities of £200 and £800 to his wife; and all other his real estate whatsoever, unto the Hon. Sir *W. H. Ashhurst*, lnt., his heirs and assigns for ever, to the use of the testators first and other sons successively, in tail male, with remainder to the use of his daughters, as tenants in common in tail general; with remainder to the use of his (testator's) brother, *James Whalley*, and his assigns for life, *sans waste*; with remainder to the use of *James Whalley*, the only son of the testator's brother, the said *James Whalley*, by his late wife *Elizabeth*, deceased, and his assigns for life, *sans waste*; remainder to the first and other sons of *James Whalley*, the son, successively, in tail male, with divers remainders over.

By indenture of covenant, dated 12th *May*, 1796, between Sir *John W. S. Gardiner* and Lady *Gardiner* of the one part, and the said *George Gostling* and *Henry Newcome* of the other part, after reciting the settlement made upon Sir *John's* marriage, and that he and Lady *Gardiner* were desirous of exonerating the premises at *Tackley* from the payment of the rent charge of £800, secured for the jointure of Lady *Gardiner*, in case she should survive him; and that the same should from thenceforth be exclusively charged on the premises at *Cuddesdon* and *Denton*, which being free from all incumbrances, and of the annual value of £1150, would afford an ample security for payment thereof, Sir *John* and Lady *Gardiner* covenanted to levy a fine, *sur cognu- sance de droits comme ceo*, unto the said *George Gostling* and *Henry Newcome* of all the lands in *Tackley, Cuddesdon, and Denton*, to certain uses therein declared. The

reputed manor of *Wheatley* was not named in the above indenture; a fine was duly levied, in pursuance of the above deed, as of *Easter* term, 36 Geo. 3., in which *George Gostling* and *Henry Newcome* were plaintiffs, and the said *Sir John W. S. Gardiner* and *Martha*, his wife were deforciant, of messuages and lands in the parishes of *Tuckley*, *Cuddesdon*, and *Denton*.

*Sir John W. S. Gardiner* died on the 18th of *November*, 1797, without issue, leaving *James Whalley*, his brother and heir at law, not having altered or revoked his will, otherwise than by the operation of the above fine, and seised, together with other real property, of the estates devised by his will.

The said *James Whalley*, by his will, dated the 2d of *July*, 1796, previous to the death of his brother, devised all his real estates, except certain copyhold estates therein mentioned, unto *Streynsham Master*, and *Adam Cottam*, their heirs and assigns, in trust for his eldest son, *James Whalley*, during the term of his life, without impeachment of waste, with remainder to *William Assheton* and *John Atherton*, and their heirs, during the life of his said son, to preserve the contingent remainders, with remainder to all and every other the son and sons of the body of his said son, successively in tail male, with remainder over. The last mentioned testator, soon after the death of his brother, *Sir John W. S. Gardiner*, made a codicil to his will, of which the following is the substance: "Whereas, by the death of my late brother, *Sir John W. S. Gardiner*, without issue, I am become entitled for life to certain estates, &c., mentioned in the will of *Sir William Gardiner*, bart. under and by virtue of the same will, with remainder to my first and other sons in tail male, &c., by which event the said estates, &c., will upon my death descend and go to my eldest son, *James Whalley*, I do, therefore, consistently with my will, revoke and

1819.  
PARKER  
v.  
BISCOE.



1819.  
PARKER  
v.  
BISCOE,

annul the limitation therein mentioned of my estates, &c. in favour of my said son, it being still my will that my said estates therein mentioned shall not be held or enjoyed by any one of my sons or daughters or their issue, together with the estates, &c. so limited by the will of my brother, as more fully expressed in the proviso in that behalf, in my will contained. And whereas the said Sir John W. S. Gardiner hath, by his last will, limited several lands at *Tackley*, in the county of *Oxford*, and elsewhere, in favour of me for life, with remainder to my children and their issue; and it also being my will that my said estates in my will mentioned, and which are situate in the county of *Lancaster*, shall not be held or enjoyed by any of my said sons or daughters, or their issue, together with the estates, &c. so limited by the will of the said Sir John W. S. Gardiner, until the ultimate remainder limited by my will shall take place or come into actual possession. I do therefore will and declare, that the proviso contained in my will shall be extended so as to comprehend the estates so limited by the will of the said Sir John W. S. Gardiner, as well as those limited by the will of the said Sir William Gardiner, and for preventing my estates in my will directed to be settled, from going with the estates so limited by the will of the said Sir John W. S. Gardiner, exactly in the same manner as is provided by the said proviso, with respect to the estates limited by the will of the said Sir William Gardiner. I do also will and declare, that such of my children as may happen to be entitled, under my will and this codicil, to my estates, in my will directed to be settled, shall be considered as an eldest child, so far as to prevent, and for the purpose of preventing such child from being entitled under my will, to any part of the money to arise from the sale of my copyhold estates therein mentioned."

The said *James Whalley*, having taken the title of Sir *James Whalley Smythe Gardiner*, died on the 21st of *August*, 1805, without revoking or altering his will, except by the above codicil, and leaving *James Whalley*, now Sir *James Whalley Smythe Gardiner*, his eldest son and heir at law. By indentures of lease and release, dated *July*, 1807, upon the marriage of the said last mentioned Sir *James W. S. Gardiner*, reciting that he was seised of an absolute estate of inheritance in fee-simple in possession, in lands situate among other places in *Tackley*, *Cuddesdon*, and *Denton*, and that a treaty of marriage had been carried on between him and *Frances Mosley*, it was witnessed, that in consideration of that intended marriage, the said Sir *James W. S. Gardiner* did grant, bargain, sell, alien, release, and confirm unto the plaintiffs, and to their heirs and assigns, all the lands comprised in the will of the said Sir *John W. S. Gardiner*, deceased, to hold the same to them, the said plaintiffs, to certain uses therein declared: and it was provided by the said indenture of release that it should be lawful for the plaintiffs and their executors, &c. at any time thereafter, at the joint request of Sir *James W. S. Gardiner*, and *Frances*, his wife, during their joint lives, and after her decease, then, at his request alone, to dispose of and convey, either by way of absolute sale or exchange, all or any part or parts of the estates thereby released.—The estate in question is comprised in the settlement made by Sir *John W. S. Gardiner*, in *July*, 1787, and is situate in the parishes of *Tackley*, *Cuddesdon*, and *Denton*, and a small part thereof is in the hamlet of *Wheatley*, in the parish of *Cuddesdon*, and was sold under the power reserved to the plaintiffs by the settlement made in *July*, 1807, and at the joint request of the said Sir *James W. S. Gardiner*, and *Frances*, his wife, according to the form prescribed by that settlement. The question for

1819.

PARKER  
v.  
BISCOE.

1819.  
 PARKER  
 v.  
 BISCOE.

the opinion of the court was, whether, under the above circumstances, the plaintiffs were entitled to recover? The case came on for argument this day, when

Mr. Serjt. *Bosanquet*, for the plaintiffs, having stated, that if there were any doubt on the construction of the instruments contained in the case, as the plaintiffs claimed as heirs at law, they must be construed beneficially for them: made five points; 1st, Whether the fine levied in 1796, and the deed declaring the uses of that fine, effected a revocation of the will of Sir *John Whalley Smythe Gardiner*? And if so, then, 2dly, Whether the codicil to the will of Sir *James Whalley Smythe Gardiner* amounted to, or had the effect of a republication of such will of Sir *James Whalley Smythe Gardiner*, so as to subject the estates in *Tackley*, *Denton*, and *Cuddesdon*, comprised in the fine of 1796, to the devises and limitations contained in such will? Or, 3dly, Whether Sir *James Whalley Smythe Gardiner*'s codicil amounted to or contained a devise by implication, of the estates at *Tackley*, *Denton*, and *Cuddesdon*, comprised in the fine? Or, 4thly, Whether that codicil could, in any manner, be considered as amounting to a confirmation or restoration of the devise of these estates, contained in the will of Sir *John Whalley Smythe Gardiner*? And, 5thly, Whether, as the reputed manor of *Wheatley* was not mentioned in the said fine, the lands situate in the hamlet of *Wheatley* passed by the fine?—With respect to the first, the rule has been most clearly laid down by Lord *Kenyon*, in the case of *Goodtitle* d. *Holford* v. *Orway* (a), where he says, that “he takes it that the law of the land is now clearly and indisputably fixed, that where the whole estate is

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(a) 7 Term Rep. 419.

conveyed away to uses, though the ultimate reversion comes back again to the grantor by the same instrument, it operates as a revocation of a prior will." This rule has been recognised in *Doe d. Dilnot v. Dilnot* (a), where it was held, that if a testator, after having made his will, levy a fine to such uses as he shall by deed or will appoint, and die without making any new will, the will made prior to the fine is revoked thereby; it was, therefore, quite clear that the fine in this case operated as a revocation of the will of Sir John W. S. Gardiner. Secondly, as to whether the codicil to Sir James Gardiner's will operated as a republication of such will, the case of *Goodtitle d. Woodhouse v. Meredith* (b) was precisely in point, and Lord Ellenborough, in delivering his judgment (c) in that case, as to this question, stated, that "it had been settled in a series of cases, that the effect of a codicil is to give an operation to the codicil *per se*, and independently of any intention, so as to bring down the will to the date of the codicil;" that, therefore, may be considered as a general and established rule. This is a much stronger case than that of *Bowes v. Bowes* (d), as there the general rule was not denied, but the codicil being restrained to the *said* lands, lands purchased after the will, were adjudged not to pass, and Lord Eldon there observed, "that although a republication of a will of lands certainly speaks as of the time of the republication, yet that in all cases of this kind which had come before the courts for decision, the only question had been, Whether the particular case was or was not within the general rule?" And his lordship afterwards decanted on the intention of the testator to be derived from the codicil. Here the codicil recites the will of

1819.  
  
 PARKER  
 v.  
 BISCOE.

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(a) 2 N. R. 401. (b) 2 Maule & Sel. 5. (c) *Id.* 13—14.  
 (d) 2 Bos. & Pul. 500.

1819.  
PARKER  
v.  
BISCOE.

Sir *William Gardiner*, which operated to convey lands to himself and his sons; he therefore revoked and annulled the limitation in his own will in favour of his son, *James Whalley*. His object, therefore, was, to add nothing to the former will, but merely to revoke the limitation therein mentioned. By the subsequent part of the codicil he confines the revocation of his will to those lands of his own which are situated in *Lancaster*, and thereby expressly negatives the application either of the will or codicil to the lands in question; it cannot, therefore, be contended, that because the codicil operates merely as a revocation of his will, as to certain lands of his own, that it can be carried to the extent of giving effect to a devise of lands in a distant county; the testator, therefore, in his codicil recited that the lands he had devised by his own will, should be disposed of in a different way, confining himself to three estates, and also declared his will as to the disposition of those other estates. [Mr. Justice *Richardson*. The codicil contains no general words in confirmation of the will.] It tends rather to its revocation; for it provides for the disposition of lands to which he had become entitled by two prior wills. This construction will not defeat the intention of the testator; and although the lands in question do not vest in his son by his will, as revoked by the codicil, they still descend to him as heir at law. Thirdly, As to whether the codicil might be considered as amounting to a devise by implication. All implication is negatived; for the testator thought he had no power to devise these lands which had been previously disposed of by Sir *William Gardiner*, and his brother, Sir *John W. S. Gardiner*. Fourthly, As to whether the codicil of Sir *James Gardiner* could be considered as amounting to a confirmation of the devise of those estates contained in the will of his brother, Sir *John*: It could not so operate, unless

his will were considered as new; for confirmation can only be of what already has existence (a): as, therefore, the codicil did not amount to a devise by implication, it could not be considered as containing a confirmation of the estates comprised in the will of Sir *John W. S. Gardiner*. Fifthly, As to whether the lands situate in the hamlet of *Wheatley* passed by the fine, as the manor was not mentioned therein; and the fine comprehended all the lands in *Cuddesdon*, in which the manor of *Wheatley* was situate, it was sufficiently large to embrace this manor.

1819.  
 PARKER  
 v.  
 BISCOE.

Mr. Serjt. *Blosset*, for the defendant, was stopped by the Court, who were clearly of opinion, that the plaintiffs were entitled to recover upon every point which had been raised by Mr. Serjt. *Bosanquet*, and accordingly directed a

Judgment for the plaintiffs.

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(a) *Co. Litt.* 295. b.

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DURELL v. MATTHESON.

Thursday,  
 Feb. 4.

Mr. Serjt. *Lens*, on a former day in this term, had obtained a rule *nisi*, that the plaintiff might give security for costs, upon an affidavit that he was a native of *St. Petersburg*, and at present resident there.

Security for costs is not required from a foreigner during his absence from this country on board his own ship, if he reside here part of the year.

Mr. Serjt. *Copley* now shewed cause, on an affidavit which stated, that an action was commenced by him for freight, which became payable under a charter-party from *London to Bilbao*; that he was now gone with his vessel

1819.

DURELL  
v.  
MATTHESON.

to the continent, and expected to return in three months, when he would remain here a considerable time; that, although he was a native of *St. Petersburg*, he resided in this country four months in the year, and had continued to do so for the last forty years, and that he was fully able to pay costs. He relied on the case of *Nelson v. Ogle (a)*, where this court did not require security for costs from a foreign captain of a ship, who was in the habit of navigating to and from the ports of this country.

Lord Chief Justice DALLAS.—In that case the Court held that the plaintiff was not to be distinguished from an English sailor; and the affidavit there stated, that he had no fixed place of residence; the plaintiff here, therefore, cannot be compared to him:—for the principal ingredient in that case was a want of a fixed place of abode; but here it is sworn that the plaintiff resides in this country for four months in the year. Enough, therefore, appears on the face of this affidavit to exempt him from the necessity of giving security for costs.

*Per curiam.*

Rule discharged.

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(a) 2 Taunt. 253.

1819.

LEWIS v. CAMPBELL.

Thursday,  
Feb. 4.

THIS was an action of covenant for quiet enjoyment. The declaration stated, that on the 1st of November, 1803, by a certain indenture made between the defendant of the one part, and one *Benjamin Corp* of the other part, after reciting that by indenture dated the 1st of January, 1801, and made between *James Barclay* of the one part, and the defendant of the other part, *Barclay*, for the considerations therein mentioned, demised to the defendant, his executors, administrators, and assigns, certain tenements and premises therein particularly described, situate at *Totteridge*, in the county of *Hertford*: To hold the same to the defendant, his executors, administrators, and assigns, from the 25th of March, 1800, for twenty-one years, subject to a proviso for determining the said term at the end of the first seven or fourteen years: Yielding and paying yearly to *Barclay*, his heirs, or assigns, the yearly rent of £70, by two even and equal half-yearly payments; and which indenture further recited, that *Corp* had contracted with the defendant for the absolute purchase of several premises therein described, being part of the tenements therein above-mentioned, for the residue of the said term of twenty-one years then to come and unexpired, at the price of £420:—The defendant, in consideration thereof, had agreed to pay the said annual rent of £70 to *Barclay*, his heirs, or assigns, by virtue of the said indenture, and to pay and discharge all taxes during the continuance of the said term of twenty-one years, and to indemnify *Corp*, his executors, administrators, and assigns therefrom: It was, by the first-mentioned indenture witnessed, that for the considerations therein-mentioned, the

*A.* demises by lease to *B.*, who assigns his interest to *C.*, and *C.* to *D.*: *B.* covenants for quiet enjoyment with *C.* and his assigns. *Held*, that *D.* might maintain an action of covenant against *B.* on being ejected by *A.* for a forfeiture made by *B.* before the assignment to *C.*

If *D.* convert the premises assigned to him by *C.* into pleasure-grounds, and erect buildings thereon, after the assignment: *Held*, that he cannot recover the value of the improvements from *B.*, unless he specifically state the special damage in his declaration.

*Quære*, Whether he would even then be entitled?



1819.  
—  
LEWIS  
v.  
CAMPBELL.

defendant bargained, sold, assigned, and set over to *Corp*, his executors, administrators, and assigns, certain tenements and premises in the first indenture described, and part of, and demised by the thereinbefore in part recited indenture of lease, and which were then held under and by virtue of the same indenture of lease: To have and to hold the same unto *Corp*, his executors, administrators, and assigns, thenceforth for and during all the residue and remainder of the said term of twenty-one years therein then to come and unexpired. And the defendant for himself, his heirs, executors, and administrators, did thereby covenant with *Corp*, his executors, administrators, and assigns, that it should be lawful for *Corp*, his executors, administrators, and assigns, thenceforth from time to time, and at all times thereafter, during the continuance of the said term of twenty-one years, peaceably and quietly to enter into and upon, have, hold, use, occupy, possess, and enjoy the said tenements and premises thereby assigned, or intended so to be, and every part and parcel of the same, with the appurtenances, and to receive and take the rents and profits of the same premises, and every part thereof, without any let, suit, trouble, eviction, ejection, expulsion, interruption, hindrance, or denial whatsoever, of, from, or by the said defendant, his executors, or administrators, or any person or persons whomsoever, and free and clear, and freely and clearly, and absolutely acquitted, exonerated, released, and discharged, or otherwise, by him, the defendant, his heirs, executors, or administrators, at his or their own costs and charges, in all things well and sufficiently protected, saved harmless, and kept indemnified of, from, and against all and all manner of former and other gifts, grants, &c., at any time theretofore or thereafter to be made, done, committed, or suffered by the defendant, his executors, or administrators, or any other

person or persons ; By virtue of which assignment *Corp* entered upon the premises, and became possessed thereof, and being so possessed, on the 2d of *January*, 1804, by a certain other indenture, made between *Corp* of the one part and the plaintiff of the other, it was witnessed, that for the considerations therein mentioned, *Corp* bargained, sold, assigned, transferred, and set over to the plaintiff the lands and premises so assigned to him, *Corp* : To have and to hold the same unto the plaintiff, his executors, administrators, and assigns, for and during all the rest, residue, and remainder of the said term of twenty-one years then yet to come, and unexpired : By virtue of which last-mentioned indenture the plaintiff entered into and upon the assigned premises, and became and was possessed thereof.—The plaintiff then averred his general performance, and assigned for breach, that he had not, nor could he, from time to time, and at all times, since the assignment to him of the said demised premises, as aforesaid, and during the continuance of the remainder of the said term of twenty-one years in the said first-mentioned indenture specified, peaceably and quietly have, hold, use, occupy, possess, and enjoy the said lands and premises so assigned and granted by the defendant to *Corp*, and by *Corp* to the plaintiff as aforesaid ; nor could he receive or take the rents and profits thereof without the let, suit, trouble, eviction, ejection, expulsion, interruption, hindrance, or denial of, from, or by the defendant, or any person or persons whomsoever ; for that *Barclay*, after the making of the said first-mentioned indenture, and during the said term of twenty-one years, to wit, on the first day of *January*, 1810, and continually from thence until and at the time of the eviction and expulsion hereinafter mentioned, had lawful right and title to the said premises so assigned by the defendant to *Corp*, and by *Corp* to the plaintiff,

1819.  
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 LEWIS
 v.
 CAMPBELL.

1819.
LEWIS
v.
CAMPBELL.

as aforesaid, by reason of a certain forfeiture of the said premises before then committed by the defendant, for a breach of covenant contained in the said indenture, dated *January 1, 1801*, aforesaid; and having such lawful right and title to the same premises after the said assignment thereof to the plaintiff as aforesaid, and during the said term of twenty-one years in the said first-mentioned indenture specified, to wit, on the 11th of *August, 1811*, entered into and upon the same premises, with the appurtenances, and in and upon the said possession of the plaintiff thereof, and ejected, expelled, put out, and amoved the plaintiff from and out of the possession thereof, and kept and continued him so thereof ejected, expelled, and amoved from thence for a long time, to wit, from thence hitherto, whereby the plaintiff hath not only lost and been deprived of the use, benefit, and advantage of the said premises so assigned to him as aforesaid, but hath also been forced and obliged to, and hath necessarily paid, laid out, and expended divers sums of money, amounting together to a large sum of money, to wit, the sum of £300, in endeavouring to defend his possession of the said premises against *Barclay*, and hath also lost and been deprived of divers other large sums of money, in the whole amounting to a large sum of money, to wit, the sum of £2000, by the plaintiff paid, laid out, and expended, in and about the altering, improving, and ornamenting the same premises, contrary to the form and effect of the said first indenture, and of the covenant of the defendant by him made with *Corp* and his assigns, in that behalf as aforesaid.

The defendant pleaded, 1st, *non est factum*, as to his indenture of the 1st of *November, 1803*; 2dly, a like plea as to *Corp's* indenture of the 2d of *January, 1804*; 3dly, that *Barclay* did not enter upon the premises so assigned as aforesaid, nor did he evict the plaintiff from

the possession thereof; 4thly, that after the forfeiture, and before any eviction of the plaintiff by *Barclay*, he, *Barclay*, ratified the plaintiff's title, and that by virtue thereof he has ever since peaceably held and still holds the said lands so assigned to him as aforesaid; and, 5thly, that the plaintiff held and enjoyed the premises by the leave or license of *Barclay*.—The plaintiff added a *similiter* to the three first pleas, and took issue on the fourth and last.

1819.

 LEWIS
 v.
 CAMPBELL.

At the trial of the cause before Mr. Justice *Burrough*, at *Westminster*, at the sittings after the last *Hilary* term, the deeds mentioned in the declaration were duly proved, as well as the eviction of the plaintiff by a judgment in an action of ejectment, and by the writ of possession, and return thereto.—As to the value of the premises at the time the plaintiff was evicted, a surveyor was called, who was present when the writ of possession was executed, who had long known the premises; and who stated that the plaintiff had made several additions, which consisted of a coach-house, and other out-buildings; and that he had converted the land in question, which consisted of eight acres, into pleasure-grounds; and that the surveyor estimated these improvements at £450; and that the property without them was worth £900: it was also admitted that all the buildings were erected by the plaintiff since the defendant's assignment to *Corp*; and that they were contiguous to his other property. The jury found a verdict for the plaintiff for £750, when it was submitted for the defendant, that he was not entitled to recover more than the value of the premises without the improvements. The learned judge, therefore, reserved the question for the consideration of the court, whether the defendant was answerable to the full extent, and whether it was properly laid in the declaration as a special damage, as the buildings were erected by the plaintiff himself since the assignment; or, whether the

1819.
LEWIS
v.
CAMPBELL.

measure of damages ought not to be £300, which was the value of the premises at the time of the assignment; but he was strongly inclined to think that the plaintiff was only entitled to recover £300.

Mr. Serjeant *Lens*, in the course of the last term, had obtained a rule *nisi*, that the entry of final judgment on this verdict might be stayed, or the damages reduced to £300: he submitted, *first*, as to the arrest of judgment, that this action could not be maintained, as there was no privity of contract or estate between the plaintiff and defendant, and that if any action were maintainable, it ought to have been brought in the name of *Corp*, with whom the covenant was entered into by the plaintiff; that there was no privity in respect of the estate, either by the common law, or by the statute 32 Hen. 8. cap. 34., so as to entitle an assignee to maintain an action of covenant in his own name, as the defendant had parted with his whole estate and interest in the land assigned to *Corp*; and there was afterwards no privity of estate between the defendant and *Corp*, or the plaintiff; the defendant, having no reversion left in him, could not have distrained for rent reserved on the assignment to *Corp*, for he had assigned all his interest to him. *Secondly*, as to the damages; that at all events the verdict must be reduced, as the plaintiff was only entitled to recover the value of the property at the time of the assignment of the lease, and not for the improvements made by him, for these improvements formed no part of the value of the term; and the special damage alleged in the declaration was for payment of a sum of money about the altering, improving, and ornamenting the same premises contrary to the form of the covenant made by the defendant with *Corp*: these erections were not assigned by the defendant to *Corp*, and therefore the judgment must either be arrested, or the damages reduced to £300.

Mr. Serjt. *Bosanquet* now shewed cause, and observed, as to the first point, namely, whether the action was maintainable, on the ground that there was no privity of estate between the plaintiff and defendant, and that the latter had no reversion: the statute of 32 *Hen.* 8. was not at all applicable:—The defendant assigned the remainder of his interest in the term to *Corp.*, having entered into the covenant in question; and it has been said that there is no privity of estate, because he has no reversion left in him, or can be considered as a tenant with respect to the present plaintiff: but that is not the principle as to privity of estate; such privity depends on whether the person claiming the benefit of the estate has a remedy by an action of covenant against the covenantor. If a person make over an estate in fee, with a covenant or warranty annexed to the deed of conveyance when the estate is disposed of in fee, nothing is left. The law as to warranty is laid down in *Sheppard's Touchstone* (a), where it is said, that “all those that are parties to a warranty, that is, such as are named in the deed regularly, shall take advantage of the warranty: as if one doth warrant land to another, his heirs, and assigns; in this case both the heirs and assigns may take advantage of it, and they both may vouch or rebut, or have a *warrantia chartæ*, so as they come in in privity of estate; for otherwise the heirs or assigns cannot vouch or have a *warrantia chartæ*.” So, if one grant to warrant land to another, his heirs, and assigns, the heirs or assigns, heirs of the assignee, or assignee of the heirs of the feoffee, or assignees of assignees, *in infinitum*, shall take advantage of the warranty; and therefore, if one enfeoff *A.* and *B.* *habendum*, to them and their heirs, and warrant the land to them, their heirs, and assigns, and

1819.
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 LEWIS
 v.
 CAMPBELL.

(a) Cap. 8. page 198.

1819.

 LEWIS
 v.
 CAMPBELL.

A. die, and *B.* doth survive and die, and his heirs enfeoff *C.*, *C.* shall take advantage of this warranty, as assignee. The same doctrine which applies to warranty holds, if possible, still stronger in covenant; and in *Purfrey's* case (*a*) *Coke* cited the case of *Randall v. Barker* (*b*), where *B.* covenanted that if *R.* pay £400 to him or his assigns before such a day, he would stand seised to his use in fee, and before the day *B.* enfeoffed one *W.* of the land, at which day the money was tendered to *W.*, it was adjudged that it was due to him as assignee of the land, and not to *B.*, who was the covenantor. In *Middlemore v. Goodale* (*c*) it was held, that if *A.*, seised of lands in fee, convey them by deed indented to *B.*, and covenant with *B.*, his heirs and assigns, to make further assurance, and after *B.* conveyed it to *C.*, who conveyed it to *D.*, and after *D.* required *A.* to make another assurance according to the covenant, and he refused, *D.* might have an action of covenant against *A.* by the common law, as assignee to *B.* In the present case the whole of the defendant's estate was assigned over to *Corp.*, and the assignee was entitled to the benefit of the covenant, not by the benefit to be derived from the statute of *Hen. 8.*, but by the common law. A covenant must be expounded more beneficially than a warranty (*d*); the plaintiff here may maintain the action as assignee, because the covenant is for quiet enjoyment, and relates to the land. *Noke v. Audler* (*e*) was an action of covenant relating to a term for years, and brought by the assignee of an assignee against the assignor; and there a lessee for years assigned over his term by deed to *J. S.*, and covenanted that *J. S.* and his assigns should enjoy the land during the term

(*a*) *Moore*, 243, *S. C. Viner*, *Abr. Covenant*, K. 10. — (*b*) 14 *Eliz.* — (*c*) *Cro. Car.* 503—505. 1 *Rolle's Abr.* 521, pl. 6. *S. C.* — (*d*) *Co. Litt.* 384, b. — (*e*) *Cro. Eliz.* 373, *id.* 436.

without interruption; afterwards *J. S.* assigned over his term by parol, and the assignee, being disturbed, brought covenant, and the court held that it well lay, although the assignment was but by parol, because there was a privity of estate; and that where a covenant is annexed to a thing which of its nature cannot pass without deed at first, in such case the assignee ought to be in by deed, otherwise he should not have advantage of a covenant; but where a covenant was not so, but ran with the estate, the assignee should have covenant without shewing any deed of assignment; and *Coke*, who was then the attorney-general, and the defendant's counsel, admitted, that the law was clearly so: That case, therefore, both in fact and principle, was similar to the present, and is an authority precisely in point. It is not necessary, to create a privity of estate that the covenantor should have a part of such estate remaining in him. The cases of *Webb v. Russell* (a), and *Stokes v. Russell* (b), were decided on covenants between a mortgagor and mortgagee, and nothing vested in the latter but the equity of redemption; and the questions there were, whether covenants made between a mortgagor and mortgagee ran with the land, so as to charge the assignee of the mortgagor; and in the one case it was held, that the covenants, not being made with the person who had the legal estate, did not run with the land, and that the assignee of the mortgagee could not maintain an action on them; and in the other, that the mortgagor himself might maintain such action, the covenants being in gross.—With respect to the second point, whether the plaintiff is entitled to recover the whole amount of the damages found by the jury, the only feasible ground of objection is, that the

1819.

 LEWIS
 v.
 CAMPBELL.

(a) 3 Term Rep. 393.—(b) *Id.* 678.

1819.
LEWIS
v.
CAMPBELL.

special damage is not properly laid in the declaration. As to the buildings having been subsequently placed on the land, no authority has been cited to shew that the plaintiff is not entitled to recover their value; and it cannot be contended that he must be tied down to the value at the time of the assignment. It was not at all necessary to allege a special damage in the declaration, as the *gravamen* of which the plaintiff complains, and for which he sought to recover damages, was his being turned out of possession, and thereby deprived of all the benefit which he might derive by continuing in the premises; not in such condition as they might be when the assignment was made, but in the like state as when the injury accrued to him; besides, the damage he sustained was direct, and not consequential, and therefore it was unnecessary to state the special damage. If a person has put an impoverished estate into a complete state of cultivation, and bring a similar action to the present, he would be entitled to recover the full value when the injury was done: if the damage were consequential, it is necessary so to state it in the declaration; but here it was not so, for the injury was immediate, and the necessary effect was, that the plaintiff was ejected of the residue of his term from the whole of the premises assigned to him, and all the advantages belonging to them, and deprived of every benefit that he might derive from their enjoyment; he therefore is entitled to a full compensation for the loss he has sustained, and he has stated such loss to have arisen in the expenditure of a large sum in the altering, improving, and ornamenting the premises; that, therefore, is a sufficient statement. The verdict was found, not on the expenditure made by the plaintiff, but on the actual value of the premises at the time of his eviction, and ornamenting and improving are sufficient in terms to cover the erection of the buildings.

On both grounds, therefore, the plaintiff is entitled to retain his verdict.

1819.

 LEWIS.
 v.
 CAMPBELL.

Mr. Serjt. *Lens*, and Mr. Serjt. *Hullock*, in support of the rule.—This application is founded on legal principles: it being a rule of law that a *chose* of action cannot be assigned, so as to entitle the assignee to an action in his own name. The statute 32 *Hen.* 8. does not extend a remedy beyond that afforded by the common law. The plaintiff should have brought an action on the privity of contract between *Corp* and the defendant; and it should therefore have been commenced by him against *Corp*, who would then have his remedy against the defendant: and this being an action for quiet enjoyment, does not fall within the cases relative to fee and inheritance, and therefore does not run with the land. The case of *Noke v. Awdler* is therefore inapplicable. [Lord Chief Justice *Dallas*.—The covenant in this case runs with the land, and binds the assignees, and an assignee of an assignee may maintain an action of covenant, as an executor of an executor may do; and at present I think the case of *Noke v. Awdler* is precisely in point, and decides the present question.] A distinction has been drawn between a warranty and a term for years, and if the principles were so broad as have been contended for, the statute of *Hen.* 8. need not have been passed; but by that statute it is not enough that a party shall become privy after the estate has been granted, for it is necessary that he must have the reversion; with the exception, therefore, of *Noke v. Awdler*, there are a number of other cases, to shew that warranties run solely with the inheritance of the land, and do not apply to chattel interest: the case of *Noke v. Awdler* cannot, therefore, be supported, because it is not only contrary to the statute 32 *Hen.* 8., but to all the subsequent cases. In order to

1819.
 LEWIS
 v.
 CAMPBELL.

support this action, there must be either a privity of contract or estate between the plaintiff and defendant; and a privity of estate can only subsist between the lessee or his assignee in possession of the estate, and the assignee of the reversioner. In *Middlemore v. Goodale* the party was in possession at the time the action was brought, and there is no case where an action has been commenced by the assignee of a lessee, except against the party in possession: here, the defendant had no reversion, and, consequently, there could be no privity of contract between him and the plaintiff. This action, therefore, if maintainable at all, must be so by the 32 Hen. 8., which seems to have created a privity of contract, in respect of the estate as between the assignees of the reversioner and lessees or their assignees; the statute, therefore, annexes, or rather creates, a privity of contract between those who have a privity of estate, and when the one fails, the other fails with it. In *Isherwood v. Oldknow* (a), which was an action brought by the remainder man upon a lease granted by the first tenant for life under a rent reserved to the lessor, and to such other person as for the time being should be entitled to the freehold or inheritance, and the lessee covenanted with the lessor, his heirs, and assigns, to pay such rent, Lord *Ellenborough*, in delivering his judgment (b), intimated an opinion, that a plaintiff, as assignee, at common law could not maintain covenant, because, if he could, the provision in the stat. 32 Hen. 8. would have been in a great degree unnecessary. The better opinion is, that the assignee of the reversion cannot maintain an action of covenant at common law, and which appears to be clear by the preamble of that statute. In furtherance

(a) 3 Maule & Sel. 362.—(b) *Id.* 394.

and support of this position, the cases of *Thursby v. Plant* (a), *Thrale v. Cornwall* (b), *Barker v. Damer* (c), and the opinion of Lord *Kenyon* in *Webb v. Russell* (d), are decisive: the present action, therefore, could not have been maintained at common law, and, if supportable at all, must be so by the 32 *Hen. 8.*; that statute extends only to covenants which run with the land, or rather with the estate in the land, and cannot apply to him who is in possession of another's estate, *Spencer's case* (e); the statute, therefore, only continues the contract as annexed to the estate, and here there is no reversion in the defendant, neither does it follow, as of consequence, that he has any estate: this action, therefore, is not sustainable either by the common law or the statute; because, in order to bring it within the provisions of the latter, the person against whom it is brought must have a reversionary interest. This, too, is merely a *chose in action*, and therefore not assignable; and Lord *Kenyon*, in the case of *Webb v. Russell* (f), said, "it is not sufficient that a covenant is concerning the land, but, in order to make it run with the land, there must be a privity of estate between the covenanting parties." Here, such privity could only exist in the defendant, whilst he had a reversionary interest; for, if a tenant for a term of years lease for a less term, and assign his reversion, and the assignee take a conveyance of the fee by which his former reversionary interest is merged, the covenants incident to that reversionary interest are thereby extinguished. Where there is no reversion a person cannot distrain for rent, but merely take advantage of a condition broken. In an anonymous case (g), it was held, that

1819.

 LEWIS
 V.
 CAMPBELL.

(a) 1 *Wms. Saunders*, 238, 239, a. — (b) 1 *Wils.* 165. —
 (c) 3 *Mod.* 337. — (d) 3 *Term Rep.* 401. — (e) 5 *Rep.* 18. a.
 — (f) 3 *Term Rep.* 402. — (g) *Moore*, 93.

1819.
 }
 LEWIS
 v.
 CAMPBELL.

if a lessee for thirty years lease to another for ten years, he was no assignee within the statute 32 Hen. 8., for he was not tenant to the first lessor: that case, therefore, determined that the defendant must have an immediate reversion dependent on the estate of the person by whom the action is brought. This is an assignment of a mere chattel interest, and, therefore, not like the case of a covenant by a vendor of an estate in fee, which, although it might be considered as passing to the assignee of the vendee at common law, yet that cannot be considered as an authority on the present question. The defendant here was merely a termor, and that, therefore, distinguishes this case from that of *Middlemore v. Goodale*. What difference is there in the contract between the defendant and *Corp* and the demise of personal property? In *Spencer's* case (a) it was resolved, "that if a man leases sheep, or any other personal goods, for a time, and the lessee covenants for him and his assigns to deliver the like cattle or goods at the end of the time as good as the things letten were, or such price for them, and the lessee assigns them over, this covenant shall not bind the assignee; for it is but a personal contract, and wants such privity as is between the lessor and lessee, and his assigns of the land, in respect of the reversion. But in the case of a lease of personal goods, there is not any privity nor any reversion, but merely a thing in action in the personalty, which cannot bind any but the covenantor, his executors, or administrators, who represent him." [Mr. Justice *Burrough*.—The defendant still holds the remainder of the premises originally demised, and he only assigned the residue of his term to *Corp*, of a small part of them: how, therefore, can the

(a) 5 Rep. 17. 1 23.

court intend that he has parted with all his interest, or that his estate is forfeited?] A forfeiture must be entire, and cannot be for a part only. In *Noke v. Auder* it does not appear that *King* had no reversion, or the objection there raised would be applicable to this case; but the question there was, whether an assignee could have an action of covenant without a profert? and it was held that he might: but in this case there is neither privity nor reversion, but it is merely a *chose* in action; and the subsequent cases, which have been recognised by the authorities of Lord *Kenyon* and Lord *Ellenborough*, in those of *Webb v. Russell*, and *Isherwood v. Oldknow*, tend to shew that this action cannot be sustained. With respect to the second point, as to the reduction of damages, they can apply only to the state of the premises when they were assigned, and the plaintiff, by his declaration, has confined himself to those only which were applicable to the land, and therefore cannot recover *ultra* £300. The buildings were wholly distinct from, and not erected for the purpose of improving the land. The damages, as laid in the declaration, did not arise from a breach of the defendant's covenant. The plaintiff stated that he has been deprived of £2000, paid by him about the altering, improving, and ornamenting the "same premises;" these premises can only mean the land, and not the buildings subsequently erected by him. These improvements were made by the plaintiff himself, and not by *Corp*, who assigned the premises to him; his remedy, therefore, is against *Corp*, and not against the defendant; and the damages cannot be enhanced by these improvements having been made as contiguous to the plaintiff's estate.

1819.
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 LEWIS  
 v.  
 CAMPBELL.

Mr. Serjt. *Bosanquet*, in reply, observed, as to the cases that had been decided subsequently to the passing of the statute 32 *Hen. 8.*, that they merely determined that an

1819.  
LEWIS  
v.  
CAMPBELL.

action of this description is maintainable at common law; the principle to be considered here, is, whether this is a covenant that runs with the land? If so, an assignee may have the benefit of the covenant. The statute of *Henry 8.* applies solely to grantees of reversions, because it is not clear what covenants may be annexed to a reversion; but if the covenant appertains to land, it runs with it: and a covenant for quiet enjoyment does so. In *Spencer's case* (a), it was said, that if a Prior covenanted with *B.* to sing in a chapel in his manor for him and his servants, that the assignee of the manor should have covenant for a default, because it was annexed to the manor; but in that case there was no privity of estate between the Prior who covenanted to sing, and the lord of the manor: the covenant with the lord and his assigns is, therefore, analogous to an estate in fee.

Lord Chief Justice DALLAS.—This case has been very ably argued, and at great length; but, after all, I think that, both as to the facts and law, it lies in a very narrow compass. First, then, as to facts. *Barclay* was the original lessor, who demised the premises in question by lease to the defendant, who assigned his interest to *Corp.* and *Corp.* to the plaintiff. The defendant was evicted for a forfeiture, in consequence of which the plaintiff was ejected by *Barclay*, and brought his action against the defendant, and not *Corp.*, who assigned the premises to him. The question is, whether, under these circumstances, this action is well brought? This depends entirely on the construction of the covenant between the defendant and *Corp.*, and under which the latter entered

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(a) 5 Rep. 18.

into the possession of the premises. It is a covenant made by the defendant with *Corp* and his assigns for quiet enjoyment. Is not that a covenant with the assignees of *Corp*, and can it be said that it is a covenant which does not run with the land? I am clearly of opinion that it does. A distinction may be drawn between those covenants which are collateral with, and those which are inherent in the land: but this was a covenant by the defendant for the peaceable enjoyment of land, and the terms of such covenant are, that *Corp* and his assigns shall peaceably hold, use, and occupy the same from time to time, without any let or interruption by the defendant, or any other persons whomsoever. As, therefore, this is a covenant which runs with the land, there is a privity of contract, if that were necessary; but at all events, even if that were not so, there is a privity of estate. Of this I think there can be no doubt. In the case of a lessor, the rule of law is clear; namely, that an express covenant by a lessee is binding on him during the continuance of the term, although it might be broken after he has assigned his interest to another. It has been said, that that rule is founded on the principle, that the lessor has a privity of estate, because he has the reversion. But this case does not depend merely upon a privity of estate, but on the privity of contract, and the express covenant entered into by the defendant with *Corp*. In cases of an assignment of an inheritance, it is quite clear that the covenant runs with the land, and I do not see upon what principle a distinction is to be drawn as to terms for years. No case has been cited as to such a distinction having been made; but the only authority that has been referred to, as applicable to this question, is the case of *Noke v. Awdler*, which is expressly in point; and although, in that case, the particular objection, of the defendant's being a lessee

1819.  
  
 LEWIS  
 v.  
 CAMPBELL.



1819.  
~ ~  
LEWIS  
v.  
CAMPBELL.

for years, was not made, still, if such an objection were tenable, it would have been then taken, considering who the counsel were that argued that case; it is therefore impossible to distinguish this case from that, because they are precisely similar, in point of facts and principle. As to the second point that has been raised in this case, as to the damages to which the plaintiff is entitled, namely, whether he ought to recover in respect of the buildings and improvements? I think he is not; for the erection of such buildings was collateral to the land, and not made for its improvement. It would be an alarming proposition, that a covenant for quiet enjoyment is to extend to any expensive buildings that may be thereafter erected on the land, and that a person should be entitled to recover in respect of such buildings: it is impossible for the covenant to bear such a construction. The expense of the improvements here was incurred by the plaintiff himself, for his own benefit, and for the more advantageous possession of his neighbouring property. If, therefore, such damages might be recovered in any other case, I think they ought not to be in this; and more especially so, as the declaration is insufficient in this respect.

Mr. Justice PARK.—I perfectly agree with my Lord Chief Justice on both points. The first question to be considered is, whether this be a covenant which runs with the land, or not? If it be, there is no difficulty in the case, and the arguments for the defendant will not avail; and I am clearly of opinion, that it is; for the defendant covenants for quiet enjoyment against the acts of all persons whatever. The covenant itself arises from the possession of the land. I do not think that the statute of 32 Hen. 8. extends to, or affects this case. The decisions in *Middlemore v. Goodale*, and *Noke v. Awdler*,

1819.  
 LEWIS  
 v.  
 CAMPBELL.

took place nearly fifty years after that statute was passed; and considering the counsel who argued, and the judges who decided those cases, it is not only singular, but extraordinary, that the objection had not then been made. The case of *Middlemore v Goodale*, was somewhat similar to the present; for it was there established that a covenant for further assurance ran with the land. It has been truly said, that the ultimate decision of the court in that case was given on a wholly different point, and that in giving their judgment they were of opinion that the declaration was bad, as the conveyance was made to the plaintiff and his wife, and he sued alone without joining her in the action. This case is adverted to in 1 *Rolle's Abridgment*, 521. *pl.* 6., and the position there laid down is perfectly correct (*a*); and *Rolle* there said that judgment was given against the plaintiff for another cause. But I do not rely wholly on that; for the case of *Noke v. Ader* is undistinguishable from the present, and, on a full investigation of it, has removed the only difficulty I at first entertained; and I therefore think there is no ground to arrest the judgment in this case. Secondly, as to the damages, I am of opinion they ought to be reduced to £300. It has been argued for the plaintiff, that they need not be laid in the declaration, because they are immediate and direct. Suppose the plaintiff had built a theatre on this spot, it would evidently tend to the ruin of the defendant, in case it should be transferred to him: but I think that the plaintiff has not sufficiently stated the nature of the damage in his declaration to raise the question; because he has merely stated that he has laid out a sum of money in and about the altering, improving, and ornamenting the same premises. The

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(a) See a literal translation of this passage, *Vin. Abr. Covenant*, K. *pl.* 6.

1819.  
LEWIS  
v.  
CAMPBELL.

"same premises" refer to the land only, and not the buildings; besides, it may be inferred from the terms of the declaration, that these expenses were merely for agricultural purposes, and incurred by the plaintiff for the cultivation and improvement of the land.

Mr. Justice BURROUGH.—With respect to the damages the plaintiff is entitled to recover; I fully expressed my sentiments at the trial, and still remain of the same opinion. As to the question, whether this action be maintainable; if the case be doubtful, the court ought not to arrest the judgment, as it would shut out the question, or prevent the plaintiff from bringing a writ of error; but I have no doubt that the action is maintainable. Many statutes have been passed, and although they apparently provide for every possible event, still there have been several cases by which the parties might be remedied by the common law, although they might have been provided for by such statutes. The case of *Noke v. Auder* is precisely in point, and was determined fifty years after the statute of Hen. 8. had passed; and the question there was agitated by *Coke*, who was then the attorney-general, on the one hand, and *Popham*, who was a most able lawyer, on the other, and the court seem to have decided the point at common law, without referring to the statute. The judges then had the statute, which had then lately passed, before them, and the facts of that case are similar to the present; it will be, therefore, too much for the court to say, that the case of *Noke v. Auder* was not rightly decided. But, individually, I am clearly of opinion, that their judgment was correct; and I further think that the defendant is here liable, as he expressly covenanted with *Corp* and his assigns for quiet enjoyment, which is a covenant that runs with the land.

Mr. Justice RICHARDSON.—The decision of my Lord Chief Justice, and my two learned brothers who have preceded me, will be productive of no danger in misconstruing the statute of *Hen. 8.*, or over-ruling those cases which have been provided for by the common law; and I perfectly concur with them in saying, that I think the present action is well brought. The statute of *Hen. 8.* has no bearing upon this point; for it provides for two cases; the one in giving to the grantees and assignees of a reversion the like remedies as to the assignees of the grantor, the other in giving similar remedies to the tenants, or their assignees, against the grantees of the reversion; that, therefore, does not apply to those remedies which the lessors had against the assignees of the lessees, or which the assignees of the lessees had against their lessors. Both these latter cases are provided for by the common law. The law, as to this point, is very well laid down by Mr. Serjt. *Williams*, in a note to the case of *Thursby v. Plant (a)*, where it is said that the assignee of the reversion might bring covenant against the lessee, and the lessee against the assignee of the reversion, in any county, upon such express covenants contained in the lease as run with the estate and the land demised; such as non-payment of rent, not repairing, and the like, by virtue of the statute 32 *Hen. 8.*; but the learned serjeant said, that the assignee of the reversion must bring the action against the assignee of the term in the county where the land lies, because the statute 32 *Hen. 8.* transfers the privity of contract to the assignee of the reversion, in the same manner as the lessor had it: and for the same reason, a covenant by the assignee of the lessee against the lessor,

1819.  
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 LEWIS  
 v.  
 CAMPBELL.

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(a) 1 *Wms. Saunders*, 241, b. note 6.

1819.  
LEWIS  
v.  
CAMPBELL.

or the grantee of the reversion, is also local; for it lies at the common law, in respect of the privity of estate, which is always local. The present case does not come within the provisions contained in the statute of *Hen. 8.*, for it is a covenant which runs with the land, and is sought to be enforced by the person who has the land, against the covenantor, and not in respect of a reversion. Suppose the defendant, instead of assigning his interest to *Corp*, had conveyed the estate in fee, and covenanted with him and his assigns for quiet enjoyment, as he has now done, it is quite clear that the assignee might maintain an action for the covenant broken. This was the case of *Middlemore v. Goodale*; and it was there held, that *D.*, to whom the estate had been conveyed, might have an action of covenant against *A.*, by the common law, as assignee to *B.*, to whom *A.* had made conveyance. The doctrine of that case is well laid down in *Rolle's Abridgment* (a), and the principle of that decision is equally applicable to the assignment of a chattel interest in land, as to an estate in fee. Unless this distinction had been drawn subsequent to that determination, it is of itself decisive; but no case has been found in which such a distinction has been pointed out; that case, therefore, is an express authority in point, and it is impossible to distinguish it from the present. *King* was there precisely in a similar situation to *Barclay* here, and his lessee entered into a covenant in exactly the same terms as the lessee here. An action of covenant was then brought by an assignee of an assignee against an assignor; that case, therefore, is at all fours with this; and *Coke*, who argued for the defendant, made an objection that the assignment was not properly made, with-

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(a) 521. pl. 6.

out adverting to the point, whether the action was well brought; and the court there held that an assignee might have an action of covenant without shewing a deed of assignment. It is quite clear that the statute *Hen. 8.* must have been within the knowledge of the counsel and the court, and it was determined that the action was well brought. As to the damages, I do not think that they can be extended to the improvements made by the plaintiff. It appeared in evidence, that he annexed the land in question to his pleasure-grounds, and built hot-houses, and other buildings, for his own pleasure, and for the advancement of his adjoining estate; these erections, therefore, cannot fairly be considered within the terms of the covenant. It is not necessary for me to give an opinion, if they had been made for the improvement of the land, whether the plaintiff would have been entitled to recover; but it is sufficient to say, that the plaintiff should have stated his special damage in the declaration, which he has not done. It does not appear that he had expended money in the erection of those buildings which were annexed by him after the assignment; but that he had merely expended a sum about the altering, improving, and ornamenting the same premises, which might be inferred to mean the improvement of the land, but not the erection of buildings.

1819.  
LEWIS  
v.  
CAMPBELL.

The rule in arrest of judgment was accordingly discharged, and made absolute, to reduce the damages to £300.

Friday,  
Feb. 5.

HALE v. SMALL and Others.

If a bankrupt be described in a commission as a dealer in cattle only ; evidence cannot be adduced to prove that he was a dealer in hops. *Quære*, Whether a farmer, who deals largely in sheep, and sells some at fairs from his own farm, and makes purchases and sells at the same fair, at a profit and loss ; and buys and sells others that had never been at any fair, be a trader within the  
5 Geo. 2. c. 30.  
s. 40. ?

THIS was an action of trespass, for breaking and entering the plaintiff's closes and dwelling-house, and taking his cattle and household furniture. The defendants pleaded not guilty.

At the trial of the cause before Mr. Justice *Park*, at the last assizes at *Winchester*, the only question was, whether the plaintiff were a trader within the meaning of the bankrupt laws, at the time a commission of bankrupt was taken out against him, under which the defendants claimed ? It appeared that the act of bankruptcy took place in *January*, 1817, and that a commission issued, dated on the 23d of that month, on the petition of one of the defendants, in which the plaintiff was described as a dealer in cattle only, without stating him to be a dealer and chapman. It was proved that the plaintiff was a farmer at *Westworldham*, in the county of *Hants*, and that a person had attended and trimmed a great many sheep for him, and drove them to fairs, and that he had also fetched sheep for him from third persons. It was also proved that the plaintiff dealt in sheep ; that he wintered about 100, but that in summer he had none, and that he bought and sold sheep ; that he sold some that had never been to any fair, as well as some that had never been on his farm. That he also made large purchases at fairs, and in one instance drove 100 to *Basingstoke*, and from thence to *Ewell* fair, to be sold : that he took 100 other sheep to *Guildford* fair, which he had procured elsewhere. That he also sold sheep at different fairs, sometimes at a profit, at others at a loss ; and sometimes bought sheep at a fair, and sold them again there without driving them home. Evidence was also gone into as to his being a dealer in

hops, and it was proved that he grew some on his own farm, and that he attended *Weyhill* fair, where he not only sold his own hops, but purchased and sold large quantities there by sample; and that his own farm would not produce so large a quantity as he sold:—When it was contended, for the plaintiff, that he could not be made bankrupt as a farmer, and that, if he dealt in cattle, it was necessary for his farm; and that he was, therefore, only a jobber or drover, and did not come within the spirit of the bankrupt laws; in support of which the cases of *Bolton v. Somerby* (a), *Stewart v. Ball* (b), and *Mills v. Hughes* (c), were relied on; it was also insisted, that the defendants were confined to their evidence of the trading, according to the description set out in the commission, as a dealer in cattle, and not a dealer and chapman; and that, with regard to his dealing in hops, the evidence was not admissible, as he was not described as such in the commission; and that even if he were, the dealing, as proved, would not make him a trader within the case of *Stewart v. Ball*. The learned judge left it to the jury to determine whether the acts of buying and selling were incidental to the farm, and requested them, if they found the plaintiff a trader, to give their reason for so doing; and stated, that a question had been raised as to the buying and selling of sheep, making the plaintiff a drover. The jury, however, found that the plaintiff was a dealer in cattle and hops, and accordingly gave a verdict for the defendants; but leave was given to the plaintiff to move to set it aside, in case the court should be of opinion that the defendants were not entitled to retain it.

1819.  
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 HALE
 v.
 SMALL.

(a) 11 East. 274.—(b) 2 New Rep. 78.—(c) Willes, 588.

1819.
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 HALE  
 v.  
 SMALL.

Mr. Serjt. *Onslow*, in the course of the last term, had obtained a rule *nisi*, that this verdict should be set aside, and a new trial granted, on the grounds that the verdict was given against evidence and law; as it had not been proved that the plaintiff was a dealer in cattle, as he was merely a drover, and therefore could not be made a bankrupt; or that, at all events, he could only be made a bankrupt as a dealer in cattle, as he was only so described in the commission; and Mr. Justice *Park* having stated that the question as to the dealing in hops was given up at the trial, the motion was confined to whether, from the evidence adduced, he might be considered as a dealer or drover within the bankrupt laws.

Mr. Serjt. *Pell* now shewed cause, and observed, that no case had ever been determined where an objection similar to the present has prevailed; namely, that the plaintiff being described in the commission, which was given in evidence, as a dealer in cattle only, that the proof must necessarily be confined to such dealing alone; and contended that it never could have been so decided, and that these words could not be considered so binding, as if he were not proved at the trial to be a dealer in cattle, that it would deprive the defendants of going into other evidence, as to another ground of bankruptcy; that the statute 13 *Eliz.* cap. 7. sec. 1. (a) had deter-

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(a) By which it is enacted, "That if any merchant, or other person, using or exercising the trade of merchandize, by way of bargaining, exchange, re-change, bartery, chevesance, or otherwise, in gross or by retail, or seeking his or her trade of living by buying and selling, and being subject born of this realm, hath departed the realm, &c. to the intent to defraud or hinder any of his or her creditors, shall be reputed, deemed, or taken for a bankrupt."

mined who should be said to be a bankrupt, and that it was unnecessary to set forth the specific trade in the commission to bring a person within the meaning of this clause; the commission here describes the plaintiff as a dealer in cattle; it may, therefore, be inferred, that he is "using and exercising trade by way of bargaining, exchange, or otherwise, or seeking his trade of living by buying and selling;" these are the only words made use of in the statute, and in this commission the supposed trade of the plaintiff has been introduced. If he had not been described as a dealer in cattle, the commission would have been sufficient; how, therefore, can such description vitiate it? It is never necessary to introduce the particular trade, and the words, "dealer and chapman," are therefore surplusage, although such words have usually crept in. It may be said that the words, "using or exercising the trade of merchandize," may have reference to the description of the plaintiff as a dealer in cattle; but there has been no decision on this point. It is true that the petitioning creditor's debt must be proved, according to the statement; but it cannot be said that such strict proof is necessary as to an act of bankruptcy; the real point is, whether, as the plaintiff was merely described as a dealer in cattle, the defendants must be tied down to so strict a proof of such dealing only, as if other evidence were admitted, it would be a ground of variance? The term, "dealer in cattle," does not destroy the effect of the other words in the commission, which are inserted according to the form of the statute. Suppose the plaintiff had been described as both a dealer in cattle and a dealer in hops, there could then have been no doubt; still, it is unnecessary to describe the trade at all; but even if it were so described, it is equally unnecessary to prove it: the words, "dealer

1819.

HALE  
v.  
SMALL.

1819.  
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 HALE
 v.
 SMALL.

and chapman," alone have always been held to be sufficient; and these are so general in their terms, as to afford no information as to what particular trade the bankrupt may carry on. The learned serjeant admitted that the cases of *Milles v. Hughes*, and *Bolton v. Sowerby*, were in point against him; but observed that the plaintiff might be made a bankrupt, as a trader, as Lord *Ellenborough*, in the latter case, had held (a), that if there had been any dealing beyond the scope of farmer, drover, or grazier, such dealing might have subjected the plaintiff to the bankrupt laws, as in the case of *Bartholomew v. Sherwood* (b), where a farmer sought his living by buying and selling horses collaterally to the business of his farm.

Mr. Serjt. *Lens* and Mr. Serjt. *Onslow*, having stated that the commission did not apply to the plaintiff's being a dealer in hops, were stopped by the court.

Lord Chief Justice *DALLAS*.—The plaintiff in this case must be made a bankrupt according to his description in the commission, and he is there only described as being a dealer in cattle; how, therefore, could the jury find that he was a dealer in hops, when the commission was confined to cattle alone? or how could the description of the one answer that of the other? It seems to me to be quite inconsistent to admit proof of his being a dealer in hops, when he was described in the commission as a dealer in cattle only; and yet the jury found that he was a dealer in both. It was improper for the defendants to have gone into evidence of the plaintiff's trading in hops; and, besides, it might operate as a sur-

(a) 11 *East*, 278.—(b) 1 *Term Rep.* 573. n.

prise on him. I, therefore, am of opinion that there must be a new trial.

1819.

HALE

v.

SMALL.

Mr. Justice PARK.—I thought, at the trial, that the plaintiff's being a dealer in hops was entirely out of the question; and that the only point for the jury to decide, was, whether he was a dealer in cattle, as described by the commission; that is, whether he might be considered as a dealer in sheep? I thought, on the evidence, that as he had dealt largely in sheep, which were not incidental to his occupation of a farmer, but with a view to sell them again for profit, that he might be deemed a dealer in cattle; and the objection there taken was, that a dealing in cattle would not support a dealing in sheep; and the question as to the hops was entirely out of the case. Where a bankrupt is described in the commission as a dealer and chapman only, it is a sufficient description of the trading in a commission; and the general statement, that the bankrupt got his living by buying and selling, will admit the finding of any particular trading (a); but, on the face of this commission, the plaintiff was described as a dealer in cattle only, and might, therefore, be prepared to rebut that trading alone; but evidence was given, at the trial, of his having been also a dealer in hops; and, on the whole of the evidence, the jury found him to be a dealer, not only in cattle, but in hops also.

Mr. Justice BURROUGH.—The evidence of trading in hops is entirely out of the question. It appears on the face of the commission, that he was not such trader; the whole of the subsequent part of the commission must

(a) *Ex parte Herbert*. 2 Rose's Bankruptcy Cases, 248.

1819.

HALE

v.

SMALL.

have reference to the antecedent description of the bankrupt's trade or profession, which is, in this case, confined to his being a dealer in cattle only. I was a commissioner of bankrupts from the year 1785 until 1816, when I was appointed one of the justices of this court; and I never recollect seeing a commission, during the whole of that period, without the words, "dealer and chapman," being therein inserted.

Mr. Justice RICHARDSON concurred.

Rule absolute for a new trial.

Friday,
Feb. 5.

KIRKUS v. HODGSON.

If a plaintiff recover a verdict for £5., subject to an order of reference at *Nisi Prius*, whether such verdict should stand, or be reduced to twenty shillings; and the arbitrator refuse to make an award; the court will not allow a verdict to be entered for the lesser sum, until such order be made a rule of court.

Mr. Serjt. *Pell* having, on a former day in this term, obtained a rule *nisi*, that a verdict might be entered for the plaintiff in this cause, for twenty shillings, on an affidavit, which stated, that he had recovered a verdict against the defendant for £5., and forty shillings costs, at the last assizes at *York*, subject to an order of reference; and that the only question submitted for the determination of the arbitrator by such order, was, whether this verdict should stand, or be reduced to twenty shillings: and that although an arbitrator had been duly appointed, and since frequently applied to, to make his award, that he had refused so to do:

Mr. Serjt. *Hullock* now shewed cause, and insisted that, as the order of reference was still in existence, the plaintiff should have made it a rule of court before the present

rule had been applied for, and referred to the case of *Jameson v. Raper* (a), where this court had very recently refused an application in the first instance, which, in terms, was undistinguishable from the present. He observed, that as the order of reference was made at *nisi prius* by the consent of both the plaintiff and defendant, that the arbitrator was still authorized to make his award, and that such award, when made, must be final.

1819.
KIRKUS
v.
HODGSON.

Lord Chief Justice DALLAS.—It appears that the arbitrator, by the order of reference, was not empowered to vacate the verdict which had been found for the plaintiff; but it merely vested a discretion in him to determine whether the plaintiff was entitled to retain that verdict, or to recover a smaller sum from the defendant. The reference at *nisi prius*, being by consent of both parties, entirely put an end to the verdict. What jurisdiction, therefore, has the court, to interfere in this stage of the proceedings? The plaintiff should have made the order of reference a rule of court before he applied for this rule; and it appears from the case cited by my brother *Hullock*,

(a) JAMESON v. RAPER.

Wednesday,
January 27.

Mr. Serjt. *Hullock* applied for a rule *nisi*, that the proceedings in this case might be staid, and that the plaintiff might pay the costs, on an affidavit, which stated that he had been an attorney of this court, and that about two years since he had been forejudged, and that the defendant arrested him when he was not entitled to his privilege, and that he was afterwards restored. That after such restoration, an order was made by one of the justices of this court at chambers, that the plaintiff might be discharged out of custody on entering a common appearance, and undertaking to bring no action against the defendant; but that, since such order, he had brought an action against the defendant for trespass and false imprisonment.

But the court refused to interfere, as the order had not been made a rule of court before this application was made.

If a judge discharge a person who had been arrested, out of custody, under an order, on his undertaking to bring no action, and he afterwards commence one in disobedience of such order, the court will not interfere to set aside the proceedings, until the order be made a rule of court.

1819.

 KIRKUS
 v.
 HODGSON.

that an application, in terms similar to the present, has been lately refused here in the first instance.

Per Curiam,

Rule discharged.

Friday,
 Feb. 5.

YOUNG v. CORDERY and another, executors of YOUNG the younger, deceased.

In an action against an administrator, who pleads *plene administravit prater* £367, and he give in evidence an inventory in the ecclesiastical court, in which he stated that £232, part of the whole sum, was the amount of certain debts due to the deceased supposed to be recoverable.—*Held*, that such debts might be considered as sperate debts.

THIS was an action of *assumpsit*, brought for the recovery of the value of the stock of a farm, which the plaintiff gave up the possession of to his son, the deceased, in the year 1813. The defendants pleaded, first, *non assumpserunt*; secondly, *plene administraverunt*; and, thirdly, *plene administraverunt*, except goods and chattels, to the value of £367 : 12s. : 5d.

At the trial of the cause before Mr. Justice *Park*, at the last assizes at *Winchester*, the defence relied on was, that the father gave the stock in question to his son, and contradictory evidence on that point was given, by both the plaintiff and defendants; but the latter, in order to establish their third plea, put in evidence an inventory and account which they had given in in the ecclesiastical court, wherein they admitted that they had a balance in their hands of £367 : 12s. : 5d. due to the deceased's estate, but in that sum was included £232 : 8s. : 6d. which was stated to be the amount of sundry debts due to the deceased, supposed to be recoverable. The learned judge doubted the credibility of one of the plaintiff's witnesses, and left the case to the jury, who found a verdict for the plaintiff for £367 : 12s. : 5d.

1819.

 YOUNG
 v.
 CORDERY.

Mr. Serjt. *Copley*, in the last term, moved for a rule to shew cause why this verdict should not be set aside and a new trial granted on two grounds: *first*, that the verdict was contrary to the opinion of the learned judge who tried the cause; and, *secondly*, that the plaintiff was not entitled to recover to the full amount of the verdict he had obtained; the defendants being charged thereby with the sum of £232 : 8s. : 6d. for debts due to the deceased's estate, which, in their account, they had stated they supposed to be recoverable, but which in fact they, as executors, had never received; and that the effect of such verdict was to charge them with the present payment of that amount, which debts perhaps they might never ultimately recover, and for which they could not become chargeable until they had been received, as they could not be considered as assets until they had come into their hands.

The Court, however, refused to set aside the verdict and grant a new trial, but granted a rule *nisi* that the verdict might be reduced, by deducting the sum of £232 : 8s. : 6d.

Mr. Serjt. *Pell* now shewed cause, and contended, that this sum being stated by the defendants in their account, as the amount of debts supposed to be recoverable, must be considered as sperate debts, and that the rule as to those debts was clearly laid down in *Shelley's* case (a), where it was determined by Lord Chief Justice *Holt*, that "all sperate debts mentioned in the inventory shall be counted assets in the executor's hands, for that is as much as to say that they may be had for demanding, unless the demand or refusal be proved." A

(a) 1 *Salk.* 296.

1819.

 YOUNG
 v.
 CORDERY.

distinction has always been drawn between sperate and desperate debts, and if there be any doubt in this case, it is, whether, as the defendants have described them in their inventory as supposed to be recoverable, such description may amount to their being construed as sperate debts. In *Buller's Nisi Prius* (a), the case of *Smith v. Davies* (b) is inserted, where Lord *Hardwicke* is reported to have said, "If, in the inventory produced, the article concerning debts did not distinguish between sperate and desperate, it would be sufficient to charge the executor with the whole *prima facie* as assets, and put it upon him to prove any of them desperate, as if the article were *Item* for debts due and owing, which I admit myself to be charged with when recovered or received (c)." The learned serjeant also relied on an affidavit, which stated, that the defendants might have recovered those debts which they had supposed in their inventory to be recoverable, if they had called for them on the persons who were indebted to the deceased.

Mr. Serjt. *Copley*, in support of the rule, observed, that the inventory was not produced in evidence at the trial until after plea pleaded, and that in the cases cited, it did not appear when the inventory was produced; at all events this sum could not be considered as assets, for in *Jenkins v. Plume* (d), it is said, "that if an executor brings an action and recovers judgment, the money re-

(a) Page 140.—(b) *Mich.* 10 *Geo.* 2.—(c) But in a manuscript note of this case, in *Schwyn's Nisi Prius*, 2d edit., 801, it is said, that Lord *Hardwicke* put the defendant on proof that she could not recover those debts; for she ought, in her inventory, to have set forth which debts were sperate, and which desperate. The defendant proved, by a witness who went to demand several of them, that he could not recover them; and accordingly they were allowed as desperate.—(d) 1 *Salk.* 207.

covered is not assets till levied by execution;" at all events such debts cannot be considered as assets for the purpose of the present suit, without evidence that they have been paid to the defendants, or released by them. In support of this, he referred to *Brightman v. Keighly* (a).

1819.
YOUNG
v.
CORDEY.

Lord Chief Justice DALLAS.—It is clear that there is a distinction to be drawn between those debts which may be considered as recoverable, and those which may not. The cases which have been cited by my brother *Pell* are, in my opinion, decisive of the present question. The defendants have admitted themselves to be chargeable with those debts which they supposed to be recoverable; this case, therefore, comes within the *dictum* of Lord *Hardwicke*, in *Smith v. Davies*, but it is infinitely stronger than that, for here the defendants have not sworn that these debts cannot be recovered; but on behalf of the plaintiff, an affidavit has been produced, in which it is sworn that they might be recovered, if the defendants had applied for them.

Mr. Justice PARK.—This point was not raised at the trial, neither was any suggestion there made as to sperate debts. The only dispute there, was, whether the verdict should be taken on the second or third plea; on the former, the plaintiff's son proved that the defendants had not accounted for some corn which was worth £15, but that in all other respects the account was allowed.

Mr. Justice BURROUGH.—Although the defendants in their third plea, have admitted that they had not administered goods to the precise amount of £367 : 12s. : 5d.,

(a) *Cro. Eliz.* 43.

1819.
 YOUNG
 v.
 CORDERY.

still, such amount is wholly immaterial; but at all events, it is equal to an admission on their part, that that was the precise sum due to the estate of the deceased; and it appears that no objection was taken at the trial, as to whether this sum was to be considered as a sperate debt or not: I therefore think that the plaintiff is entitled to retain his verdict.

Mr. Justice RICHARDSON concurred.

Rule discharged.

OWEN plaintiff, OWEN and others deforciant.

Saturday,
 Feb. 6.

KENRICK demandant, OWEN tenant, OWEN and others vouchees.

A fine and recovery of *Easter, 3 Geo. 1.* were passed, of 100 acres of land, 30 acres of meadow, 50 acres of pasture, and 10 acres of wood. In the deed

to lead the uses, the estate was described as containing 170 acres, more or less, and also a mill and lands, containing 14 acres, more or less; and, in a prior deed, it was stated to contain 200 acres, more or less. On a recent admeasurement, the estate appeared to contain 209 acres. The Court refused an amendment to increase the quantity of land, according to the late survey, as it exceeded the quantity in the deed to lead the uses; and held that, as the fine and recovery were passed so long since, it was necessary to account for the modern, as well as the ancient possession, and ascertain the successive possessors, and whether the estate had been divided or gone together, since the fine and recovery were passed.

MR. Serjt. *Taddy*, in the course of the last term, moved to amend a fine and recovery, levied and suffered in *Easter term, 3 Geo. 1.*, by increasing the quantity of land in both these instruments, from 100 to 130 acres, on payment of the increased alienation fine, and the other usual fees: he founded his motion on an affidavit of the demandant, which stated, that the estate intended

to pass was situate in the parish of *Clayton*, in the county of *Sussex*, and known by the names of *Hammond's Farm*, and *Hammond's Mill*; and that, in the year 1691, it was the property of *Nathaniel Owen*, who had previously purchased it of a person of the name of *Michelborne*, and that the said *Nathaniel Owen*, by indentures of lease and release, in that year settled the estate in question, and also all other his freehold lands in the said parish of *Clayton*, which he had purchased of *Michelborne*, on his eldest son in tail male, and remainder to the use of his right heirs; That in 1717, in a deed to lead the uses of the fine and recovery, the estate was described as in the indenture of 1691, with the addition of several other closes and lands situate in the said parish of *Clayton*, and containing in the whole, by estimation, 170 acres, more or less; and also all that mill and lands, containing, by estimation, 14 acres, more or less; and of all other the messuages, lands, and tenements in *Clayton*, purchased by the said *Nathaniel Owen*, of *Michelborne*; That in the fine and recovery it was described as 100 acres of land; 30 acres of meadow, 50 acres of pasture, and 10 acres of wood. That in a lease granted in 1769, the estate was stated to contain 200 acres, more or less; and that upon the actual admeasurement made in 1783, it appeared to contain 209 acres, being 19 acres (including the sites and buildings) more than were mentioned in the fine and recovery; and that, upon a recent sale, it was objected by a purchaser, that the fine and recovery were not sufficient to embrace the estate; but it was admitted that the description in the title-deeds appeared to be sufficient to pass all the estate purchased by the said *Nathaniel Owen*, as they contained general words, sufficiently comprehensive to embrace the quantity of land found by the survey made in 1783. The learned serjeant referred to the case of *Milbanke*

1819.
 OWEN
 v.
 OWEN.

1819.

OWEN

v.

OWEN.

v. *Joliffe* (a), where a recovery suffered in the 11th Geo. 1. was allowed to be amended, by inserting other premises not mentioned therein; and in *Tennyson* demandant, *Goulton* tenant, *Rousby* vouchee (b), a recovery of ninety-eight years old was amended by inserting a manor and tithes; and in *Alexander* demandant, *Bleasdale* tenant, *Hanford* vouchee (c), a recovery was amended by increasing the quantities of specific closes described in the deed, as being of smaller than the true quantities. But it appearing, in this case, that the affidavit did not state that the possession had always gone in the same line—

Lord Chief Justice DALLAS referred to the case of *Stone* plaintiff, *Ashby* deforciant (d), where a fine was not allowed to be amended by increasing the number of acres, where there was no other warrant for the amendment than the fact, that the closes enumerated by name in the deed, were therein stated respectively to contain, and did contain, acres, the aggregate whereof was more than the number of acres comprised in the fine. And the Court there directed Mr. Serjt. *Vaughan*, who moved the amendment, to search whether there were any precedent of a case, wherein the Court had increased the number of acres in the fine, upon the mere circumstance, that the number of acres in the deed was more than that in the fine; it not being sought to insert additional parcels omitted to be specified, and passing only by the general words, but all the closes being enumerated in the deed, and the quantity only understated in the fine. The affidavit, therefore, in this case, is imperfect; for it is necessary to account for the modern as well as the ancient possession, and the property is traced no further

(a) 2 Bos. & Pul. 580. n.—(b) 3 Taunt. 408.—(c) 4 Taunt. 734.—(d) 5 Taunt. 616.

than 1769, when a lease was granted, in which the estate was stated to contain 200 acres, more or less; and it does not appear in whose possession it has been, or whether it has been divided, or has gone together since that time. He also referred to the case of *Bartram* plaintiff, *Toane* deforciant (*a*), and observed, that the applications in the cases of *Milbanke v. Joliffe*, and *Tennyson* demandant, were not to increase the quantity of acres; and that in *Alexander* demandant, the date of the recovery was not stated.

1819.
OWEN
v.
OWEN.

Per Curiam,

Amendment refused.

Mr. Serjt. *Taddy* now renewed his application on additional affidavits from two of the inhabitants of *Clayton*, the one eighty-one, and the other seventy-six years of age, and who had both resided in that parish since their birth, and who swore that as long as they could remember, *Hammond's Farm* and *Hammond's Mill* were occupied by the father of one of the deponents, as tenant thereof, to one *John Owen*, the former proprietor; and that such deponent succeeded his father as tenant of the said mill and lands, and held the same under one *Charles Higgins*, who purchased them of the trustees under the will of the said *John Owen*, and that, upon his decease, the same became the property of one *Simon Warner*, by devise, and that he has devised the same to his son, *Kilpin Warner*, who has lately sold the same: that both the deponents were perfectly well acquainted with the farm and mill, and with the extent and boundaries thereof, as well as of the boundaries of the particular fields and closes of the same: that the quantities of land are the

(a) 1 *Marsh.* 446.

1819.
OWEN
v.
OWEN.

true quantities of the said farm and mill; and that the several closes of the said farm have, during the remembrance of the deponents, always been occupied by the tenants of the said farm and mill, under the proprietors thereof for the time being, as parts of the farm; and that no addition to, or alteration in the quantities and extent of the said farm, mill, and lands, have been made since the deponents can remember; the land constituting the farm, and belonging to the mill, being the same at this day as they were at the times they respectively became acquainted therewith: and that they had never heard of any additions or alterations in the quantity of land and contents of the farm and mill having been made previous to their knowing the same. In addition to these affidavits, the attorney for the vendor swore that he had examined and abstracted the several title-deeds, evidences, and writings of and relating to the said farm and mill; and that he had examined the parcels and description of the estate contained in the deed to lead the uses dated in 1717; and that he had compared such parcel and description with all the subsequent deeds and conveyances relating or belonging to the said estate, from the date of such deed to the time it became vested in *Higgins*, who devised the same to *Warner*; and that, in all such deeds, the parcels therein, and description of the said estate, were the same, with the exception of the names of the tenants by whom the same had been holden and occupied.—The learned serjeant observed, that this case was distinguishable from that of *Stone v. Ashby*, as the deed to lead the uses contained general words sufficient to cover the lands in question; and in that case, there were no general words whatever in the deed. That the case of *Alexander* demandant, and *Bleasdale* tenant, was a case precisely similar to the present, where the Court permitted the

amendment, by increasing the number of acres of the closes described in the deed; and the cases of *Milbank v. Joliffe*, and *Tennyson* demandant, were expressly in point, to shew, that this amendment might be made, although the fine and recovery were passed so long since as the 3 Geo. 1. That in *Bartram v. Towne* the Court would not allow the quantity of each species of land to be increased, so as to make each cover the whole quantity intended to be conveyed; and that, as here, nineteen acres only were desired to be added, such addition would come within the terms of the deed to lead the uses, as general words were contained in such deed. But,

1819.
 }
 OWEN
 v.
 OWEN.

Per Curiam.—We cannot increase the quantity of acres beyond that stated in the deed to lead the uses: in all cases where such amendments have been prayed for, they have been confined within the terms of the deed. In the deed here the property is described as 170 acres more or less, and a mill and lands, containing 14 acres, more or less, making together 184 acres. In the fine and recovery, it is stated as 190 acres, and it is now prayed to increase it by the addition of 19 acres more. This would go far beyond the terms in the deed to lead the uses. Besides, a great lapse of time has taken place since this fine and recovery were passed, and the affidavits now produced do not trace back the property with sufficient certainty to induce the Court to grant this amendment.

Refused.

Saturday,
Feb. 6.

LONGWORTH v. HEALEY.

LEE and others v. same.

If bail be put in, in the county palatine of Lancaster, where the defendant is arrested upon a *testatum capias* from London; and it appear on the face of the bail-piece that they had been put in at Lancaster:

Held, that the bail-piece was wrong, as it should have stated, that the *testatum* issued from London into the county palatine; but the Court gave time for a proper bail-piece to be transmitted, and directed that the same bail might then justify.

MR. Serjt. *Hullock* moved to justify the bail in these actions, who had been put in at Lancaster, on the usual affidavit, stating their sufficiency.

Mr. Serjt. *Copley* opposed their justification, on an affidavit, that both these actions were commenced on the 29d of November last, and that the defendant was arrested upon a writ of *testatum capias*, from London into the county palatine of Lancaster, returnable in eight days of St. Hilary, and that, on the first day of this term, rules to return the writ of mandate were obtained, and duly served: that on the 28th of January last, being five days after the commencement of the term, the defendant had obtained an order for a week's time to put in bail, without prejudice to the plaintiff's ruling the sheriff to bring in the body: that on the 4th instant, being Thursday last, notice of bail was served on the plaintiff's agents: that an exception was duly entered to them; and that it appeared on the face of the bail-piece that the bail had been put in in Lancashire, and not in London, from whence the original writ, under which the defendant had been arrested, issued, and which was a *testatum capias*. He relied on the cases of *Clempson v. Knox* (a), *Harris v. Calvart* (b), and *Hartley v. Hodgson* (c), and insisted, as there was not any commissioner or filacer in the courts of Westminster, for the county

(a) 2 Bus. & Pul. 516.—(b) 1 East, 603.—(c) *Ante*, Vol. i. 514.

palatine of *Lancaster*, that the bail-piece had been improperly taken; and,

1819.
LONGWORN
v.
HEALEY.

Per Curiam.—It is quite clear that the bail-piece is wrong: it should have been taken thus; namely, *testatum* from *London* into the county palatine of *Lancaster*;—but as it was merely an irregularity, they gave time until the last day of this term to get a proper bail-piece transmitted, and directed that the same bail might then justify (a).

(a) See the case of *Rez v. Sheriff of Middlesex*. 3 *Maulé & Sel.* 532.

O'LANGHLA v. MACDONALD.

Saturday,
Feb. 6.

Mr. Serjt. *Vaughan* moved for a rule to compel the plaintiff in this action to give security for costs, on an affidavit, which stated, that he had left this country, and joined the insurgents as an officer in *South America*. He insisted that as he was out of the jurisdiction of this court, that he was entitled to the application; but as the affidavit, on which the motion was founded, did not state what situation he held in that army, or where he was resident in *America*,

Security for costs will not be required from an English officer serving in *South America*.

The Court refused the application; and held, that in order to bring the plaintiff within the rule, he must be a foreigner; and that all English officers serving as insurgents in *South America* could not be considered as such. And Lord Chief Justice *Dallas* mentioned the case of

1819.
 O'LANGHLA
 v.
 MACDONALD.

Tullock v. Crowley (a), where it was held, that security for costs is not required of an English subject, even though he be resident abroad.

Rule refused.

(a) 1 Taunt. 18.

Saturday,
 Feb. 6.

ANONYMOUS.

Nor from a foreigner during the time he is resident in this country.

Mr. Serjt. *Vaughan* made a similar application in this case, on an affidavit, which stated, that the plaintiff was a foreigner, and that his residence was in *Dantzic*, but that at present he was a sojourner in this country. But,

The Court referred to the case of *Ciragno v. Hassan* (a), where it was held, that there was no instance in which security for costs was exacted, so long as the plaintiff remains in this country, and that it was necessary that he should have actually left it. The application was therefore

Refused.

(a) 1 Marsh. 421.

WELLS v. GIRLING.

Monday,
Feb. 8.

THIS was an action of *assumpsit* brought against the defendant, as one of the makers of a promissory note, of which the following is a copy:

“ *London, 9th June, 1817.*

“ We jointly and severally promise to pay to Mr. *John Wells*, or order, the sum of £87 : 3s., in manner following; viz. the sum of £21 : 15s. : 9d. on the 29th day of *September*, now next ensuing; the further sum of £21 : 15s. : 9d. on the 25th day of *December* next ensuing; the further sum of £21 : 15s. : 9d. on the 25th day of *March*, 1818; and the further sum of £21 : 15s. : 9d. on the 24th day of *June*, 1818. And in case default shall be made in payment of any or either of the above sums, at the times above limited for that purpose; then we jointly and severally promise to pay the whole of the said sum of £87 : 3s., or so much thereof, as shall not have been paid immediately after such default as aforesaid.

“ *W. Bath.*

“ *S. Girling.*”

If, in a joint and several note, payable by instalments, the day on which one of the instalments becomes payable be misstated in the declaration, it is a fatal variance; and if the defendant sign such note as a surety for the other maker, the plaintiff cannot resort to the common money counts.

The declaration contained one count only on the note, which stated the last instalment to be payable on the 4th, instead of the 24th of *June*, 1818. On the production of the note at the trial before Lord Chief Justice *Dallas*, at *Westminster*, at the sittings after the last term; it was objected that the plaintiff could not recover, on the ground of a variance between the note and first count of the declaration, as stated on the record; when it was insisted that he might recover on the

1819.
WELLS
v.
GIRLING.

common money counts, and that the note might be given in evidence on those counts, or on an account stated, as the action was between the original parties: but it appeared in evidence, that the defendant signed the note as a surety only, for a person by the name of *Bath*, and that no consideration had passed from the plaintiff to the defendant, and that there had been no mutual dealings between them. His Lordship was of opinion that the variance was fatal; and as there appeared to be no privity of contract between the plaintiff and defendant, and as no previous transactions had passed between them, that the plaintiff was not entitled to recover. The jury, however, found a verdict for the plaintiff on the money counts, but liberty was given to the defendant to move to set it aside.

Mr. Serjt. *Copley*, on the first day of this term, had accordingly obtained a rule *nisi*, that this verdict might be set aside, and a nonsuit entered, and relied on the case of *Gibson v. Minet* (a), where Lord Chief Baron *Eyre* said, "The theory of a bill of exchange is, that the bill is an assignment to the payee of a debt due from the acceptor to the drawer, and that acceptance imports that the acceptor is a debtor to the drawer, or at least has effects of the drawer's in his hands. But in an action wherein the declaration is upon the bill itself, creating a duty by the custom of merchants, this is all out of the case. In any other action of *assumpsit* at common law, founded on a bill of exchange, the bill is offered as evidence only of the duty. It has been expressly determined, that a general *indebitatus assumpsit* will not lie on a bill of exchange; but the *indebitatus* must be for some duty, such as money lent, &c., and the bill is offered as

(a) 1 H. B. 602.

evidence of that duty. Now, when it is offered as evidence of the duty, it is but evidence; and any of the presumptions which the writing affords may be contradicted by evidence; and from the whole of the evidence the jury must draw the conclusion of fact, that so much money was lent, so much had and received, &c. The presumptions of evidence which the writing affords, have no application to the *assumpsit* for money paid by the payee or holder of a bill to the use of the acceptor: it must be a very special case which will support such an *assumpsit*."

1819.
WELLS
v.
GIRLING.

Mr. Serjt. *Vaughan* now shewed cause, and admitted that the plaintiff was not entitled to recover on the first count, on the ground of the variance; but contended, that the note might be given in evidence, on the common money counts, or, at all events, under an account stated; and he referred to the cases of *Dimsdale v. Lanchester* (a), *Thompson v. Morgan* (b), and *Waynam v. Bend* (c). If the declaration had contained a special count that *Bath* was indebted to the plaintiff, and an account had been taken between them, and that in consideration that the plaintiff would forbear to sue *Bath*, the defendant promised to pay, it would have been a good consideration, and the plaintiff would have been entitled to recover.

Lord Chief Justice DALLAS.—I was decidedly of opinion at the trial, that the variance on the first count of the declaration was fatal. The action was brought on a joint and several note, to which it appeared the defendant had attached his signature, as a surety for one

(a) 4 *Esp. Rep.* 201.—(b) 3 *Camp.* 101.—(c) 1 *Camp.* 173.

1819.
WELLS
v.
GIRLING.

Bath. It was then contended, that the plaintiff might resort to the common money counts; but I told the jury, that in order to entitle him to recover on those counts, there must have been a privity of contract, or prior or mutual dealings between him and the defendant. As it appeared that there had been no such dealings between them, and as the defendant was a surety only, there could be no consideration for which the note was given.

Mr. Justice PARK.—It is quite clear that the variance is fatal; and equally so, that the plaintiff is not entitled to recover on the common money counts, as the defendant merely signed the note as a surety for a third person, when there had been no previous dealings between him and the plaintiff.

Mr. Justice BURROUGH.—The note was produced at the trial, when it appeared that the date on which one of the instalments became payable was mis-stated on the record; that, therefore, was a ground of nonsuit; and as there were no dealings between the plaintiff and defendant, it is quite clear that the former could not recover on the money counts; still, it has been insisted that he might do so on the account stated: but suppose the plaintiff had taken this note payable at three months, and commenced his action before the expiration of that time, he must then have resorted to the instrument, in which case he would undoubtedly have been nonsuited.

Mr. Justice RICHARDSON.—It has been said, that the plaintiff might have recovered on an account stated between him and the defendant; but it is obvious that such an account must have been founded on a preceding *bona fide* debt between them, for the language of that count is “for sums due from the defendant to the plaintiff;”

and in this case the plaintiff's only remedy was on the note; for it was proved that nothing was due from the defendant to the plaintiff, neither had there been any preceding transactions between them.

1818.
WELLS
v.
GIRLING.

Rule absolute for a nonsuit.

CLEBORN v. DES ANGES, Knt. and another, Sheriff of Middlesex.

Monday,
Feb. 8.

THIS was an action, brought against the defendants as late sheriff of *Middlesex*, for a false return of *nulla bona* to a writ of *feri facias*, issued at the suit of the plaintiff, against one *Thomas Fitzgerald*.

In an action against a sheriff for returning *nulla bona* to a *feri facias*, which had been lodged with him at seven o'clock in the evening to be levied, and no writ of error had been allowed at half-past six on the evening of that day, but it appeared that the allowance was made within the day. Held, first, that

At the trial of the cause before Lord Chief Justice Dallas, at Guildhall, at the sittings after the last term, the facts appeared to be these: The plaintiff having brought an action against *Fitzgerald*, and recovered about thirty pounds; on the 26th of May, signed final judgment for £44: 1s.: 5d., being the amount of the whole of the damages; and on the same day delivered to the defendants a writ of *feri facias*, returnable in fifteen days of the *Holy Trinity*, and which was indorsed to levy £45: 3s.: 5d., besides sheriff's poundage, &c. and a warrant was obtained the same day directed to their

such allowance operated as a *supersedeas*, as it might be made at any time before the day had expired; secondly, that the sheriff should not have returned *nulla bona*, but that a writ of error had been allowed, and that therefore the plaintiff was entitled to recover nominal damages. *Quære*, whether in order to prove the allowance of a writ of error, it be necessary to produce the original writ and allowance, or an examined copy thereof, or whether it be incumbent on the party to prove the service of such writ?

1819.
CLEGHORN
v.
DES ANGES.

officer. In the course of that day, *Fitzgerald* having previously procured a writ of error, obtained the allowance of the same; and on the morning of the 27th, caused notice of such allowance to be served on the plaintiff's attorney, and early in the morning of that day the defendant's officer entered and levied on the effects, when he found an officer already in possession, under two prior writs of *feri facias*, at the suit of one *Abrahams*. The officer, however, left the warrant in the hands of the man then in possession, and afterwards, the plaintiff having ruled the defendants to return the writ, they returned *nulla bona*.

For the plaintiff, it was proved, that on the 26th of *May*, his attorney searched for the allowance of the writ of error at half-past six in the evening, and an inquiry was made at the office of the clerk of the errors, whether the writ had been allowed or not; that the clerks looked on the file and examined the books, and said, it did not appear that the writ of error had been then allowed; that at seven o'clock on the evening of the same day, the writ of *feri facias* was lodged at the office of the defendants, with instructions where to levy, and that it was executed early in the morning of the following day; it was also proved, that at the time the officer entered under the plaintiff's execution, there were more than sufficient effects to have satisfied the amount directed to be levied.

The defence rested on two grounds; *first*, that the sheriff being in possession of *Fitzgerald's* effects under the warrants of *Abrahams*, was not bound by law to make his return to the writ he had received from the plaintiff; and as such effects were not equal to satisfy that debt, there could not be any goods and chattels of *Fitzgerald* from which he could cause the sum required, to be satisfied; and that it was incumbent on the plaintiff to shew in the first instance, that the defendants, as sheriff, might and ought to have

levied on the effects of *Fitzgerald*, because it is an *onus* cast on every plaintiff in an action similar to the present, to shew that he has a legal right to levy on the effects of his debtor;—and, *secondly*, that as the writ of error was in law a *supersedeas* to the original action from the moment of allowance, the sheriff could only levy by becoming a trespasser, and, as a necessary consequence, it would be taking advantage of his own wrong, for a plaintiff to call on the sheriff for not levying, when, in point of law, he had no power to do so. As, however, the defendants merely proved the former warrants, and not the judgments or executions, the first ground of their defence failed, when they relied on the latter, and for that purpose put in evidence a paper, purporting to be the allowance of the writ of error, but neither the writ of error nor any office copy was produced, when it was objected for the plaintiff, that for the circumstances above stated, such allowance had been improperly sued out, and that its service ought to be proved, as well as the delivery of the writ to the clerk of the errors on the 26th of *May*.—His Lordship referred to the cases of *Meagher v. Vandyck* (a), and *Hawkins v. Jones* (b), where it was held, that a writ of error operates as a *supersedeas* from the time of the allowance, though it be not served till after execution, and that, without any communication with the plaintiff. As it appeared that the writ of error in this case was allowed on the 26th of *May*, and as it was not in evidence on what part of that day it was made, or that the defendants had any knowledge or notice of its allowance, he directed a *nonsuit*, but gave the plaintiff leave to apply to set it aside, and that a verdict might be entered for him for such sum as the Court should direct.

1819.
 CLEGHORN
 v.
 DES ANGES.

(a) 2 *Bos.* and *Pul.* 370.—(b) 5 *Taunt.* 204.

1819.
 CLEGHORN
 v.
 DES ANGES.

Mr. Serjt. *Vaughan*, on a former day, had accordingly obtained a rule *nisi*, that this nonsuit might be set aside, and instead thereof a verdict entered for the plaintiff for £45: 3s.: 5d., or such nominal damages as the Court should direct. He founded his motion on two grounds; *first*, that under the circumstances, the writ of error was no bar to the defendants levying, and that their officer should have executed the writ, and taken possession on the evening of the 26th of *May*, when it was delivered to the defendants, and not have waited till the following morning; *secondly*, that admitting the defendants could not levy the damages, yet in having returned *nulla bona*, they had made a false return, for which the plaintiff was entitled to recover nominal damages; that they should have returned the fact, namely, that a writ of error had been previously sued out and allowed.

Mr. Serjt. *Lens* now shewed cause. It has been clearly established, that after a writ of error allowed, the plaintiff in the original action, is estopped from calling on the sheriff to return his writ, the defendants, therefore, in this case, ought to have made no return; but it is not because they have obeyed a rule improperly procured, that the plaintiff can be suffered to take advantage of his own wrong, to seek damages against the defendants for making a return, which in law was a nullity, and which was made in obedience to a rule illegally obtained. In order to shew that a writ of error was a *supersedeas* in law to the execution from the moment of allowance, he relied on the cases of *Hawkins v. Jones* (a), and *Meagher v. Vandyck* (b), which had been referred to by the Chief Justice at the trial, as well as to *Jaques v.*

(a) 5 Taunt. 204.—(b) 2 Bos. and Pul. 370.

1819.
 CLEGHORN
 v.
 DES ANGES.

Nixon (a), and *Sampson v. Brown (b)*, to shew that a plaintiff cannot call on the sheriff for his return to a writ of execution after allowance of error. In point of fact, *Fitzgerald* had no goods which the defendants could take in execution at the suit of the present plaintiff when the levy was made; if they had so done, they would have been guilty of a contempt, for the allowance of error was of itself a *supersedeas*, and the plaintiff could not have had the fruits of the execution. The return of *nulla bona* was a correct and proper return, for the defendant, *Fitzgerald*, had no goods that could be levied. All the previous cases have determined, that a writ of error is a stay of proceedings without notice, and it was not proved that the defendants had any knowledge of its being sued out; and in *Sampson v. Brown (c)*, Mr. Justice *Lawrence* referred to *Cotton v. Daintry (d)*, where it is said, that though the sheriff shall not be in contempt if he make execution after the writ of error, if no *supersedeas* be sued out, for that he had no notice; yet the writ of error, immediately on the sealing, forecloses the Court, so that the execution made after it is to be undone.

Mr. Serjt. *Vaughan*, and Mr. Serjt. *Hullock*, in support of the rule, made two points; *first*, whether the return of *nulla bona* was not, under the circumstances, a false return; and, *secondly*, whether the plaintiff was intitled to recover nominal damages, or the amount of the original debt. They observed, that all the cases that had been cited as to the effect of the allowance of a writ of error, had been between the original parties to the suit,

(a) 1 Term Rep. 279.—(b) 2 East, 439.—(c) 2 East, 440.—(d) 1 Vent. 31.

1819.
 CLEGHORN
 v.
 DES ANGES.

and not as in this case, between the plaintiff and sheriff; the facts of this case, therefore, exclude the law as laid down in the previous decisions. The defence in fact is, that the defendants were in possession under two other writs of execution on prior judgments, and therefore returned, *nulla bona*, to the writ in question; but these writs could not be connected with the warrant in the present case: and it is no ground of defence that they were in possession of *Fitzgerald's* goods under those former writs when the present was sued out, and that therefore they need not execute such writ, and as it was delivered on the evening of the 26th of *May*, the levy ought not to have been deferred until the following morning. On the delivery of the writ to the sheriff, the execution was executed, as no writ of error was then allowed, and he was at that time in possession of *Fitzgerald's* goods under two prior executions, and need not therefore enter again under this. At all events, the defendants should have proved the precise time when the writ of error was sued out, for which purpose they should have produced the writ of error, with the allowance itself, to shew that it was between the same parties; or, if that could not have been procured, then an examined office copy of the writ and allowance ought to have been produced and proved. As the defendant's officer began to execute the writ by taking possession of the goods, they could not abandon that possession and return *nulla bona*; but should have stated the special circumstances why the execution had not been completed. The return is contrary to the facts proved, and the plaintiff is therefore, at all events, entitled to a verdict for nominal damages.

Lord Chief Justice DALLAS.—The plaintiff, in this case, had recovered £44 : 1s. : 5d. against one *Thomas Fitzgerald*, upon a judgment obtained in this court for

that sum; and in the evening of the 26th of *May* last, the defendants, as sheriff of *Middlesex*, had a *feri facias* lodged at their office by which they were directed to levy for such sum. It appears that the defendant, in the original action, had applied for, and obtained, an allowance of a writ of error on that day, but that on inquiry at the office of the clerk of the errors, such allowance had not been made at half-past six in the evening; but as it appeared to have been allowed on that day, it is immaterial whether it were done before or after application at the office, as it might be done within any hour before that day had elapsed, I therefore think that it operated as a *supersedeas*; the defendants were not previously in the legal possession of *Fitzgerald's* goods, for it appeared at the trial, that the warrants did not correspond with the writs which had previously been sued out, and no objection was then taken as to whether the defendants should have produced the writ of error itself, or an examined copy of it; but under the particular circumstances of this case, and the facts that have been proved, I think the plaintiff is entitled to recover nominal damages; but I expressly wish it to be understood, that I decline giving any opinion as to whether the allowance of the writ of error was sufficiently proved at the trial; that is a question of importance, as by all the previous decisions, the writ of error operates as a *supersedeas* from the moment of allowance; neither do I give any opinion whether the service of the writ itself be necessary.

1819.

 CLEGHORN
 v.
 DES ANGES.

Mr. Justice PARK.—The only question is, whether the allowance of a writ of error be a good defence to this action, and if so, whether the evidence adduced at the trial, be sufficient to prove it. Under all the circumstances, I think the plaintiff is entitled to nominal damages, and that this action should not be carried further.

1819.
 CLEGHORN
 v.
 DES ANGES.

Mr. Justice BURROUGH.—The defendants, in this case, cannot be considered as trespassers for entering the house of *Fitzgerald* to levy under the writ of execution which had been sued out by the plaintiff; they should have returned the fact on the writ, namely, that a writ of error had been previously allowed, the Court would then have relieved them. I think the execution in this case was well executed, and that the plaintiff therefore is only entitled to recover nominal damages.

Mr. Justice RICHARDSON declined giving any opinion, having been before consulted in the cause.

Rule absolute for entering a verdict for the plaintiff, damages one shilling.

Tuesday,
 Feb. 9.

GRAY v. MILNER.

If a bill of exchange be drawn, payable to the order of the drawer at a particular place, without being addressed to any person, and the defendant afterwards accept it: *Held*, that such bill need not have been directed to, or described the defendant by name; and that by such acceptance he adopted the place of payment.

THIS was an action of *assumpsit*, brought by the plaintiff as holder, against the defendant as acceptor of the following bill of exchange.

May 20, 1813.

Two months after date, pay to me or my order, the sum of thirty pounds, two shillings.

William Sustanance.

Payable at No. 1, *Wilmot Street*,
 opposite the *Lamb, Bethnal Green, London.*

need not have been directed to, or described the defendant by name; and that by such acceptance he adopted the place of payment.

The words "accepted, *Charles Milner*," were written across the body of the bill, and it was indorsed by *Sustenance* to the plaintiff.

1819.

 GRAY
 v.
 MILNER.

The declaration contained two counts on the bill: The first of which stated, that *Sustenance*, on the 20th of May, 1813, according to the usage and custom of merchants, made his certain bill of exchange, by which said bill he requested the defendant, two months after date thereof, to pay to him (*Sustenance*), or order, the sum of £30:2s., and made the same payable at No. 1, *Wilmot Street*, opposite the *Lamb, Bethnal Green, London*, and that the defendant then and there accepted the same, and that *Sustenance* indorsed it to the plaintiff; that afterwards, when the bill became due and payable according to the tenor and effect thereof, to wit on the 23d of *July*, 1813, at No. 1, *Wilmot Street*, opposite the *Lamb, Bethnal Green, London*, the bill was duly shewn for payment thereof, and payment of the same was then and there duly demanded; but that neither the defendant, nor any other person on his behalf did, or would at the time when the bill was so presented, or at any time afterwards, pay the said sum of money therein specified, but neglected and refused so to do: By means whereof the defendant became liable, and promised to pay.—The second count stated, that *Sustenance* made his certain other bill, by which he requested the defendant two months after date, to pay to him or order £30:2s., and that the defendant accepted the same, and that *Sustenance* indorsed it to the plaintiff: By means whereof the defendant became liable to pay to the plaintiff the sum of money in that bill specified, and that being so liable, he promised to pay: The latter count was amended, by stating, that the drawer made his bill, by which he required two months after the date thereof, the payment to himself or, order of the sum

1849.
 {
 GRAY
 v.
 MILNER.

of £90:2s., omitting the name of the defendant. To these were added counts for goods bargained and sold to the defendant and delivered to *Sustenance*, and all the money counts. The defendant pleaded the general issue,

At the trial of the cause, before Lord Chief Justice *Dallas*, at *Westminster*, at the sittings after the last term, on the production of the bill it did not appear to be addressed to any one, but that the defendant had accepted it in the usual form, and it was proved, that on being applied to for payment, he admitted the acceptance, and said, that if the plaintiff had called himself, he would have paid it. It was further proved, that the place at which the bill was made payable, was the residence of the drawer, and not of the defendant, who accepted it at another place;—when it was objected for the latter, that the plaintiff was not entitled to recover on two grounds: *first*, that the instrument produced was not a bill of exchange according to the custom of merchants, as it was not directed to any person, and as the place at which it was made payable was proved to have been the residence of the drawer; *secondly*, that if it were a bill of exchange, neither of the first or second counts could be supported, as the first stated that the drawer made his bill, by which said bill he requested the defendant to pay, which was contrary to the instrument produced, as the defendant was not named in it.—That the second count, as amended, did not state that the defendant was the person drawn on; or that at all events, it was at variance with the bill, as it was made payable at a particular place of which no notice was taken in that count; but it merely stated a general acceptance by the defendant. The jury, however, found a verdict for the plaintiff, but his Lordship reserved the objections taken for the opinion of the Court.

Mr. Serjt. *Copley*, on a former day in this term, had accordingly obtained a rule *nisi*, that this verdict might

1819.
 GRAY
 v.
 MILNER.

be set aside and a nonsuit entered; and in support of the necessity of averring a presentment at the place where the bill was made payable in the second count, he relied on the cases of *Gammon v. Schmoll* (a), *Callaghan v. Aylett* (b), and *Sanderson v. Bowes* (c). He observed, that this was the second action which had been brought upon this instrument by the plaintiff against the defendant; and on the first, which was tried in the Court of *King's Bench*, the declaration stated, that the drawer made his bill, and thereby required the defendant to pay, and the plaintiff was nonsuited, as the Court held, the instrument did not support the declaration.

Mr. Serjt. *Vaughan* subsequently shewed cause, and observed as to the first objection, namely, the want of a direction to the drawee, that it was cured by the defendant's acceptance; for that as soon as he had attached his name to the bill, it became a perfect instrument, and that by accepting it, he admitted it to be addressed to himself. That in *Shuttleworth v. Stephens* (d), it was decided, that an instrument in the common form of a bill of exchange, except that the word "at" was substituted for "to," might be declared on as a bill of exchange, or as a promissory note, at the option of the holder; that in *Allan v. Mawson* (e), it was determined, that an instrument which appeared on common observation to be a bill of exchange, might be treated as such, although words were introduced into it for the purpose of deception, which might make it a promissory note. Here, the defendant has, by his acceptance, not only recognised, but adopted the place at which the bill is to be paid; and although it was not ad-

(a) 1 *Marsh.* 80.—(b) 3 *Taunt.* 397.—(c) 14 *East,* 500.—(d) 1 *Camp.* 407.—(e) 4 *Camp.* 115.

1819.
GRAY
v.
MILNER.

dressed to him, still if he accept it, it is quite sufficient. By an acceptance, a drawee engages to pay to any subsequent indorsee; this, therefore, is a stronger case than that of *Allan v. Mawson*, for there the action was brought against the drawer, the bill not having been accepted, and Lord Chief Justice *Gibbs* decided that case on the authority of *Shuttleworth v. Stephens*, which was precisely in point, as the instrument there was exactly similar to the present, the name of the drawee being omitted. The plaintiff is therefore entitled to recover.

Mr. Serjt. *Blosset* (for Mr. Serjt. *Copley*), in support of the rule, submitted, that the question to be considered, was not whether the defendant was estopped by his acceptance from taking an objection to the bill's not having been addressed to him, but whether this instrument were a bill of exchange by the usage and custom of merchants, and whether it had been so stated in the declaration as to render the defendant liable upon it. A bill of exchange, according to the custom of merchants, is incomplete until it is properly addressed to the drawee. The cases of *Shuttleworth v. Stephens*, and *Allan v. Mawson*, were not decided on the subsequent acceptance, and in the latter, the drawees were addressed by name, and Lord Chief Justice *Gibbs* there said, that he should not have hesitated to decide, that, in point of law, that instrument was a bill of exchange, had the word "at" been distinctly written before the names of the drawees; and his Lordship left it to the jury, whether that word, from the manner in which it was written, was not inserted for the purpose of deception, and they found that it was. In that case there was no acceptance: and the only question was, whether the bill had been properly addressed to the drawees. So, in *Shuttleworth v. Stephens*, the action was against the drawer, who re-

1819.
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GRAY
v.
MILNER.

quired payment from *Morson and Co.* and the declaration stated that the bill was drawn by the defendant on them; if the word "to" had been there inserted instead of "at," there would have been no difficulty in the case; but residence alone is not sufficient, for the drawee must be addressed by name. Both these cases, therefore, are distinguishable from the present, as there the names of the drawees appeared on the face of the bills, whereas, here, there was no name whatever on the instrument. As to the objection, with respect to the averment of presentment in the second count, the cases cited are precisely in point; and that count, therefore, cannot be sustained.

Cur. adv. vult.

Lord Chief Justice DALLAS on this day said, The Court do not consider it necessary that the acceptor should have been described by name; the designation of the place where the bill was made payable is of itself sufficient, and the plaintiff is therefore entitled to retain his verdict. The defendant, by his subsequent acceptance, has not only recognised, but adopted the place where the bill was to be paid.

Rule discharged.

Tuesday,
Feb. 9.

DOE on the several demises of SPENCER and others
v. REID and others.

A consent rule in ejectment for admitting the landlord to defend, need not set out the christian and surname of the lessor of the plaintiff.

MR. Serjt. *Blosset* having, on a former day, obtained a consent rule for admitting the landlords to be joined and made defendants, with the tenant in possession—

MR. Serjt. *Lens* now took a preliminary objection to the rule, which was entitled *Doe* on the several demises of *Spencer* and others v. *Roe*. This, he said, was insufficient, as the christian and surnames of each of the parties to the rule should have been set out at length. But,

Per Curiam.—*John Doe* is not a nominal but a real plaintiff, and it is not necessary to particularise the names of the lessors, for he may proceed to judgment in his own name; and this rule, therefore, is properly entitled.

This being the only informality complained of,

Rule absolute.

Thursday,
Feb. 11.

CLARK and another v. CALVERT.

An action of trespass, *quare clausum fregit*, is maintainable by a tenant

THIS was an action of trespass. The first count of the declaration stated, that the defendant with force and arms, &c. broke and entered into the several closes of from year to year, who had become bankrupt after the committing the trespass, and before the commencement of the suit; and the right of such action does not pass to the assignees by the assignment, unless they interfere; as the bankrupt may sue as a trustee for, and has a good title against all persons but, them.

Trees growing in a nurseryman's ground, who was a yearly tenant to the plaintiff, and removable by such tenant from time to time, are not distrainable for rent, under the 11 Geo. 2. c. 19. s. 8.

the plaintiffs (enumerating and describing them), and with spades, shovels, and pickaxes, tore up, dug up, subverted, damaged and spoiled the earth and soil of the plaintiffs; and also dug up, uprooted, cut down, prostrated, and destroyed divers trees and plants there growing, and took and carried away the same, and converted and disposed thereof to his own use. The second count was for seizing and carrying away the trees and plants — The defendant pleaded, *first*, that the plaintiffs, on the 1st of *March*, 1817, and from thence until the suing out a commission of bankrupt, were nurserymen, dealers and chapmen, and that so using and exercising trade, they on that day were indebted to *George Blair* and *William Plimpton*, in the sum of £100, for a debt due from the plaintiffs to them: and that they were also indebted to divers other persons; and that being so indebted they became bankrupts; and that on the 11th of *March* a commission issued upon the petition of *Blair* and *Plimpton*: By virtue of which commission the plaintiffs were, on the 8th of *April*, found bankrupts, and that three of the commissioners who so found the plaintiffs to be bankrupts, afterwards, and after the committing the said supposed trespasses in the said declaration mentioned, and before the commencement of this suit, to wit, on the 22d of *April*, 1817, by a certain indenture made between the said commissioners of the one part, and *George Blair* and *James Gray* of the other part, the commissioners did, for the considerations therein mentioned, order, bargain, sell, dispose, assign, and set over unto *Blair* and *Gray*, then duly appointed assignees of the estate and effects of the plaintiffs, all and singular the goods, chattels, effects, debts, and all other the personal estate whatsoever that the plaintiffs were possessed of or entitled to, at the time they so became bankrupts, or at any time since; and all the estate, right, title, interest, property, claim and de-

1819. •
 CLARK
 v.
 CALVERT.

1819.
CLARK
v.
CALVERT.

mand whatsoever of the plaintiffs, of or in the premises, or any part thereof: To have and to hold the same in trust for the benefit of the creditors of the plaintiffs:—And the defendant further said, that the closes in the declaration mentioned, were, at the said time, when, &c., and at the time of the bankruptcy, and since, held by the plaintiffs for a term of years [and that the commissioners, as aforesaid, in further execution of the commission, by a certain other indenture, after the committing the supposed trespasses in the declaration mentioned, to wit, on the 22d of *April*, made between the commissioners, as aforesaid, of the one part, and *Blair and Gray*, assignees as aforesaid, of the other part, did, for the considerations therein mentioned, grant, bargain, sell, assign, and set over unto *Blair and Gray*, as such assignees, all and singular the freehold and copyhold messuages, lands, tenements, and hereditaments, wherein the plaintiffs at the time they became bankrupts, or at any time since, had any estate, right, title, or interest, in possession, remainder, reversion, or expectancy, or otherwise, and all claim and demand of the plaintiffs in and to the same premises: To hold the same to the use of *Blair and Gray*, upon trust for the plaintiffs' creditors. And the defendant further said, that the last-mentioned indenture was duly enrolled before the commencement of this suit]: And so the defendant said, that the rights of action in the declaration mentioned, were, by means of the premises, duly assigned to *Blair and Gray*, as assignees as aforesaid; and this, &c.; wherefore, &c.; if, &c. *Secondly*, as to the taking and carrying away the trees and plants in the first count, and the trees and plants in the last count of the declaration mentioned, the defendant pleaded a plea similar to the first, omitting the part between brackets, as above, and concluded thus: And so the defendant said that the rights of action in

the declaration mentioned, as to the premises in the introductory part of that plea mentioned, were, by means of the premises, duly assigned to *Blair and Gray*.

1819.
CLARK
v.
CALVERT.

Thirdly, as to the breaking and entering the closes in the first and last counts mentioned, and digging up and carrying away the trees and plants therein also mentioned, that he, the defendant, was, and still is, seised of and in the said closes, in which, &c. in his demesne, as of fee, and being so seised, that afterwards and before the said time when, &c., to wit, on the 25th of *March*, 1818, he, the defendant, demised the said closes in which, &c. unto the plaintiffs: To have and to hold the same to the plaintiffs, as tenants thereof, to the defendant from year to year, so long as they should respectively please; (the said close called the nursery-ground, to be holden as and for nursery-ground, with the power and liberty of planting and raising thereon, and removing from time to time, and taking away such trees and plants as might, at any time, during the said demise, be planted or raised on the said nursery-ground in the way of their trade and business as nurserymen, intended to be carried on in the said demised premises): Yielding and paying to the defendant the yearly rent of £70, payable half-yearly: By virtue of which demise the plaintiffs entered into the premises in which, &c., and were possessed thereof, from thence, until, and at the said time when, &c.: That the plaintiffs being so possessed, £70 of the rent aforesaid, due and payable to the defendant for one year, ending on the 2d of *February*, 1817, was then, and at the said times when, &c., in arrear and unpaid to the defendant; for which cause he, at the said several times when, &c. entered into the said several closes, in which, &c., in order to distrain, and did distrain for the rent so due and in arrear to him, as aforesaid, and then and there, for that purpose, seized and carried away the

1819.
CLARK
v.
CALVERT.

trees and plants in the first, and the trees and plants in the last count of the declaration above-mentioned, then being in the said close in which, &c., called the nursery-ground, for and in the name of a distress for the rent so due and in arrear to him, as aforesaid, and carried away the same: And the defendant said that the said trees and plants were planted and raised by the plaintiffs after the demise to them, and were such as they might have removed by virtue of the power and authority to them given as aforesaid, and were at the said time when, &c. fit to be taken out of the ground, and removed, carried away, and sold in the course of their said trade and business: And the defendant further said, that after due notice of distress given to the plaintiffs in this behalf, according to the form of the statute in that case made and provided, and after five days had elapsed after such notice, and the said rent still remaining unpaid, the defendant, for the purpose of carrying away the same, as and for such a distress, necessarily dug up and uprooted the trees and plants in the first count of the declaration mentioned; and, in so doing, necessarily and unavoidably, with spades, shovels, and pick-axes, tore up, dug up, subverted, damaged, and spoiled the earth and soil in the said closes, doing no unnecessary damage on the occasion aforesaid; and also removed the trees and plants in the last count mentioned, as and for such distress, as was lawful for him to do, for the cause aforesaid, which were the same several trespasses in the introductory part of that plea mentioned, whereof the plaintiffs have above complained against him.—The fourth plea was nearly similar to the third, except that the defendant stated, that the plaintiffs, during the continuance of the demise, and before and at the said times when, &c. used and enjoyed a part of the said closes, in which, &c. so demised as a nursery-ground in the way of their trade


and business, as nurserymen, carried on therein, and planted and raised trees and plants there for sale, in the course of their said trade and business, and from time to time, dug up, carried away, and sold the said trees and plants, in the way of their trade and business as nurserymen, and thereby made profit of the said part of the said thereby demised closes, so used, in lieu, and instead of sowing and raising thereon corn, and other produce of that nature. To all those pleas there was a general demurrer and joinder.

The questions raised by the demurrer to the two first pleas were, whether this action could be supported by the plaintiffs for breaking and entering their lands, and seizing and taking away their trees, they having become bankrupts after the committing the trespasses, and before the commencement of the action? or, whether it should not have been brought by their assignees, on the ground, that the right of action passed to them by the assignment? And as to the third and fourth pleas, whether trees planted and growing in a nurseryman's ground were distrainable for rent, under the 11 Geo. 2. c. 19. s. 8.?

The case came on for argument, in the last *Trinity* term, when

Mr. Serjt. *Hullock*, for the plaintiffs, contended, that this being an action of trespass, *quare clausum fregit*, could only be maintained by the plaintiffs, who had the actual possession of the premises; and that their assignees, therefore, could not sustain such action during the occupation by the bankrupts. Legal possession is not sufficient. If the defendant had pleaded not guilty, the assignees could not have maintained this action. Although the plaintiffs' interest was merely for a term of years, which might pass as a chattel interest to the assignees, still the present suit could not be sustainable by them. It is

1819.
CLARK
v.
CALVERT.

1819.

 CLARK
 v.
 CALVERT.

quite impossible that they could have recovered damages in any shape, commensurate with the injury as stated in the declaration in this case. It is immaterial to consider whether the last count be good; for the only question is, whether the plaintiffs are entitled to recover for the whole of the trespass that has been committed. They might have brought trover; but still they could not have recovered damages to the full extent of the injury here complained of. The assignees had neither the occupation nor possession of the premises, at the time the trespass was committed. If the plaintiffs' interest had been assigned, still the right of action vested in them, and they might have maintained trespass, or trover, against all the world but their assignees. Unless the latter had interfered, the Court cannot interpose on behalf of a stranger. In *Webb v. Ward* (a), where an application was made for the plaintiff, who was an uncertificated bankrupt, and had brought an action of trover for goods, to give security for costs, Lord *Kenyon* said, "It cannot be laid down as a general rule, that an uncertificated bankrupt must, in all cases, give security for costs, where an action is brought by him; that would be going much too far: each case must depend on its own circumstances. But it is fair to say, that if the action be really brought for the benefit of the assignees, they should be responsible for the costs. But what weighs with me to grant the present application, is, that this action must be brought for the benefit of the assignees; for an uncertificated bankrupt cannot have any property of his own."—Here, until the assignees had interposed, the plaintiffs had a right to maintain this action; for they might be considered as trustees for others beneficially interested, and having good title against all persons but the assignees:

(a) 7 *Term Rep.* 296. But see *contra*, *Anonymous*, 2 *Taunt.* 61.

Laroche v. Wakeman (a). [Lord Chief Justice Dallas.—Is there any case where an action of trover has been commenced by the bankrupt before his bankruptcy?] The right of the assignees to the bankrupt's personal property accrues between the commission and assignment; and the assignment vests the whole of such property in them, whether it be in the hands of the bankrupt at the time of the bankruptcy, or whether it come to his possession afterwards. Unless, therefore, it be stated on the record that the assignees have interfered, the cases of *Webb v. Ward*, and *Laroche v. Wakeman*, are precisely in point:—and where no claim is made by the assignees, the bankrupt may maintain trover for goods acquired by him after his bankruptcy against all the world but them: *Webb v. Fox* (b). The principle in that case is applicable to the present: the question raised by the record there, is precisely similar to this; and it was there admitted, that the bankrupt might maintain either trespass or trover. And Lord Kenyon said (c), “That if the plaintiff had brought an action of trespass instead of trover, his possession would have entitled him to recover against a wrong doer; and the form of the action cannot alter the law.”—In *Fowler v. Down* (d), the debt accrued subsequent to the bankruptcy, and Lord Chief Justice Eyre there said, “What shall be done between the bankrupt and the assignees, or creditors, is one thing, and what between him and a stranger, is another. This narrow ground, that the bankrupt has a right against every body but the assignees, which is maintained by authorities, is sufficient to support the verdict. It is not true, that in cases of special property the party must once have had posses-

1819:

 CLARK
 v.
 CALVERT.

(a) *Peake's Ni. Pri. Cases*, 140.—(b) *7 Term Rep.* 391.
 —(c) *Id.* 397.—(d) *1 Bos. & Pul.* 44.

1819.
 CLARK
 v.
 CALVERT.

sion, in order to maintain trover; for a factor, to whom goods have been consigned, and who has never received them, may maintain such action. But this is not a case of special property; it is a stronger case: it is entire property, though defeasible; or, to speak more correctly, liable to be divested. It is not competent to a third person to dispute the bankrupt's title to recover; who, supposing his creditors had no claim upon him, would be entitled to his action, because, whether they have such claims or not, is nothing to the stranger." And Mr. Justice *Rooke* said, "If a stranger is under any difficulty about defending himself against the assignees in a subsequent action, he has only to give them notice of the first, and inquire whether they choose to defend it, and thereby he would be secured." The principles laid down in all those cases were affirmed in that of *Cumming v. Roebuck* (a), where Lord Chief Justice *Gibbs* held, that unless the assignees interposed, the bankrupt might maintain the action, and sue as their trustee. At all events, if it were competent to the assignees to have brought this action in their own names, the pleas of the defendant are not well pleaded; for, if either of the counts of this declaration can be supported, the pleas are bad; as they cannot be good in part and bad in part. It does not appear in either of them that the assignees had interposed; they might, therefore, either have renounced or taken the property: it should have been stated, that they had taken to, and claimed, the bankrupt's property. In *Kitchen v. Bartsch* (b), the defendant pleaded, that the promises in the declaration mentioned were first made, and accrued to the plaintiff, when he was adjudged a bankrupt; and that, after the making of the promises, the assignees required the de-

(a) 1 *Holt, Ni. Pri. Cases*, 172.—(b) 7 *East*, 53.

defendant to pay to them the several sums supposed to be due from the defendant to the plaintiff, by reason of which premises the assignees were entitled to the several sums in the declaration mentioned. The replication stated, that the promises accrued to the plaintiff after he became a bankrupt, and that the defendant treated with him as a person capable of receiving credit in those behalves; and Lord *Ellenborough* there held, that "the uniform tenor of the previous decisions had been, that the general assignment of personal property by the commissioners, in the first instance, passes all the future acquired, as well as present personal property of the bankrupt." And Mr. Justice *Lawrence* said, "That in all the modern cases, where the action brought by the bankrupt against third persons had been sustained, it had been distinctly stated, that the bankrupt could only recover where the assignees did not interfere;" and he took the distinction in that case, that it was expressly stated on the record, that they had interfered, and required the defendant to pay the debt to them. On these grounds, therefore, the plaintiffs are entitled to recover.

1819.
CLARK
v.
CALVERT.


Mr. Serjt. *Copley* in support of the pleas.—Mr. Justice *Le Blanc*, in the case of *Kitchen v. Bartsch*, observed, "That all the Courts had said in any case, was, that where the assignees did not interfere, one who has contracted with the bankrupt *after his bankruptcy*, shall not protect himself on their account against the claim of the bankrupt." In all the cases that have been relied on for the plaintiffs, the rule has been confined to property acquired subsequently to the bankruptcy; and there is not a single *dictum* to be found in either of those cases applicable to property previously obtained; the general rule is, that all rights of action pass to the assignees, except those on personal wrongs, and that all the bankrupt's pro-

1819.
CLARK
v.
CALVERT.

perty is transferred to them by the assignment, and that they alone can maintain an action. In the case of *Webb v. Fox*, the defendants merely pleaded the bankruptcy of the plaintiff before the conversion; and he replied, that after the assignment he became and was lawfully possessed of the goods, and so continued without any claim by the assignees until the defendants took the goods. If the proposition contended for be correct, it would be necessary in all pleas, stating the bankruptcy of the plaintiff, to aver that assignees had not interfered so as to prevent his right of action; but no such averment can be necessary, for it is quite sufficient to set forth the bankruptcy and assignment; if it were otherwise, this doctrine would apply to all actions: and in all the cases in *assumpsit*, where bankruptcy has been specially pleaded, no such averment has been ever introduced; the consequences that would result would be, that the bankrupt, immediately after the commission, and before the assignment, might commence actions against all his creditors, and prevent the interposition of the assignees: that would be not only contrary to practice, but to principle. In the recent case of *Kinnear v. Tarrant (a)*, the defendants pleaded the bankruptcy of the plaintiff generally, without an averment that the assignees had intermeddled with the property.—As to whether this action be maintainable by the present plaintiffs, it is quite clear that it is not; for the only actions that are not assignable are personal *torts*, such as slander and assault; but all those affecting the property of the bankrupt pass immediately to the assignees. Here, the property was diminished by the trespass committed in digging up the trees, and the assignees had an

(a) 15 East, 622.

immediate right of action; so they might have maintained trover on their being taken away. If the defendant had cut down trees on the property of the bankrupts, the assignees might have brought either trespass or trover; because they would have not only the property of the trees vested in them, but also in the soil on which they grew. Whatever injury may be done to a bankrupt's property, before the bankruptcy, gives a ground of action to the assignees, and not to the bankrupt himself. If this had been an action on a contract, the assignees must have stated the facts in their declaration; so, here they might have stated, that the plaintiffs diminished the value of the property, by digging up and converting the trees in question. It is true, they might not elect to take to this property; but it does not appear that it was an onerous inheritance, or that it would not be beneficial to the assignees: this, therefore, may be assimilated to a personal chattel, and it must be assumed that the property was advantageous to them. If they could maintain trespass for cutting down trees, so could they maintain trover for the acts of the cutting and conversion. No distinction can be drawn between the two actions. In the one, it is not necessary to aver that they elected to take the possession; why, therefore, can it be required in the other? [Lord Chief Justice *Dallas*.—Can trover be maintained for trees cut down, and carried away at the same time?] If they be demanded, it may; for the trespass may be waived, and the action be founded on the *tort* alone: this right of action is therefore transferred to the assignees, and the first and second pleas are a complete answer to the plaintiffs' claim. It was not necessary for the defendant to have averred that the assignees had not interfered, and the pleas having set out the plaintiffs' bankruptcy and assignment specially, are warranted by former precedents, and the plaintiffs should have replied the fact, as in the case of *Webb v.*

1819.

 CLARK
 v.
 CALVERT.

1819.
CLARK
v.
CALVERT.

Fox; and as no case has been decided as to a question where property has been acquired previous to the bankruptcy, the defendant is entitled to judgment.

Mr. Serjt. *Hullock*, in reply.—As to the property acquired before the bankruptcy, the assignees had the same rights after it, as they had at the time when it took place; and although there is no case where the property has been in the hands of the bankrupt before the bankruptcy, still, the principles relative to property after acquired are equally applicable. In the case of *Webb v. Fox*, the plaintiff might have demurred, and need not have set out the fact in his replication; for, until it appear on the face of the record that the assignees have interposed, it cannot be inferred that they have so done. This being an action of trespass, *quare clausum fregit*, the contract under which the bankrupt held could not be stated in the declaration by way of inducement; for the interest of the assignees can only be a mere *interesse termini*. Besides, this action could not be maintainable by the assignees, till they had actually taken possession; for the bankrupts were in occupation as tenants under the lease: neither could the assignees have maintained an action of trover, unless they had shewn that they were in possession of the property in question. It is quite clear that trover is not maintainable for cutting down, and, at the same time, taking away a tree; for it is one continuous act: the plaintiffs are, therefore, entitled to recover; *First*, because the defendant, in his pleas, has not alleged the interposition of the assignees; and, as he is a *tortfeasor*, he has no right to take advantage by whom the action should have been brought. *Secondly*, that the assignees could not maintain this action for taking away the plants, as they were merely to be considered *interesse termini*, and as the trespass for breaking the closes constituted the primary cause of the action, it could not

be severed from the conversion, and the pleas, therefore, are no answer to the action.

Cur. adv. vult.

1819.
CLARK
v.
CALVERT.

The case stood over until this day, when Lord Chief Justice DALLAS delivered the following judgment:

This was an action of trespass, *quare clausum fregit*. The first count of the declaration was for subverting the plaintiff's soil, and digging up certain trees and plants: The second count was, for seizing and taking trees, &c. The first plea set out all the proceedings of a commission of bankruptcy against the two plaintiffs, and the usual assignment under it by the commissioners, to *George Blair* and *James Gray*, to be assignees of the estate and effects of the plaintiffs; and then set out a bargain and sale from the commissioners to *Blair* and *Gray*, of all the freehold and copyhold messuages of the bankrupts; and stated that this deed was enrolled. And so the defendant concluded, that all the rights of action in the declaration mentioned were, by the means aforesaid, duly assigned to the said *George Blair* and *James Gray*. The second plea was the same as the first, setting out the bankruptcy and assignment, and bargain and sale, and then concluded thus: And the defendant said, that the said closes in the declaration mentioned, were at the said time when, &c. and at the time of the bankruptcy, and since, held by the plaintiffs for a term of years; and so the defendant said that the rights of action in the said declaration mentioned were, by means of the premises, assigned to *George Blair* and *James Gray*. Third plea: That as to the first and second counts, the defendant was seised in fee; and that on the 25th of *March*, 1813, he demised to the plaintiffs to hold from year to year, and in the nursery ground therein mentioned, to plant, and also to remove trees, in the way of their trade,

1819.
 {
 CLARK
 v.
 CALVERT.

at the yearly rent of £70, payable half-yearly, and that a year's rent being in arrear, the defendant entered to distrain; and for that purpose seized and took the trees and plants (being such as the plaintiffs might have removed in their trade), and after the notices and usual time mentioned in the statute regulating distresses, carried away the same, as it was lawful for him to do. The fourth plea was nearly the same as the third.—To these four pleas there was a general demurrer.—The question raised by the demurrer to the two first pleas is, whether the plaintiffs can maintain this action, having become bankrupts, or, whether it should not have been brought by the assignees, on the ground that the right of action passed to them by the assignment. The question on the third and fourth pleas is, whether trees planted in the nursery ground were distrainable under the 11 Geo. 2. c. 19. s. 8.

In this case, we think that the plaintiffs are entitled to recover. The case of *Brandon v. Pate (a)*, required consideration. That was an action brought by the assignees of a bankrupt, to recover from the winner money lost by the bankrupt before his bankruptcy, in an action of debt founded on the statute of 9 Ann, c. 14. The majority of the Judges there thought, and Lord Chief Justice Eyre yielded to their opinion, that this right of action passed to the assignees. It was money, which was to be considered as part of the bankrupt's estate, which had wrongfully passed to the winner; and if so, the assignees had a right to it, and ought in reason to sue for it. This was a question, therefore, as to *money* of the bankrupt, which, no doubt, passed to the assignees; and they might sue, as they would in trover, for any of his goods, or in *assumpsit* for any goods sold by him, or for any money

(a) 2 H. Bl. 308.

received to his use. The case of *Smith, assignee of Eustace, v. Coffin* (a), determined as to the point for which it was mentioned, that a right to bring a real action, such as a writ of entry *sur abatement* to recover part of the real estate for the bankrupt, passed to his assignee by the usual words of assignment. The words of 5 Geo. 2. c. 90, are, that the assignment shall operate upon "all such effects of which the party was possessed or interested in, or whereby he hath, or may expect any profit, benefit, or advantage, whatsoever." The statute of 13 Eliz. c. 7. enables the commissioners to dispose of whatever property or interest the bankrupt might lawfully depart withal. It was therefore clearly and rightly held by the whole Court of Common Pleas, after a very long and elaborate argument by Mr. Serjt. *Williams*, that it was the clear policy of the bankrupt laws, that every beneficial interest which the bankrupt has, shall be disposed of for the benefit of his creditors; and as the right to those lands belonged to the bankrupt and would turn to profit, so the legislature had determined that the assignees should bring such actions as would turn those rights into possession for the benefit of his creditors. In that case, Mr. Serjt. *Williams* argued for the contrary of that which is insisted on in this case, for he contended, that the action might be brought in the name of the bankrupt for the benefit of the creditors; but Mr. Justice *Heath* points out the danger of allowing the bankrupt to bring actions for his property, for he says, "Suppose the bankrupt were to release his right of action, or make a fraudulent conveyance, if the action were brought in his name, such release or conveyance might be set up to defeat it." Therefore, the Court held that action by the assignees to be maintainable, and that infinite mischief would ensue if it were determined that every thing belonging to the bankrupt did

1819.
 CLARK
 v.
 CALVERT.

(a) 2 H. Bl. 444.

1819.
 CLARK
 v.
 CALVERT.

not pass under the general words used in the assignment. These cases, therefore, merely decide, that all the property of the bankrupt, and consequently all the powers to turn that property to profit, vests in the assignees:—But in this case, we form our opinion on the precise nature of the action; and on the ground that the assignees had not interposed, as in those cases. This is an action of trespass for an injury done to the soil, and which no one can maintain, but he who is in the actual possession of it. It may be extremely doubtful, whether the assignees, in their own names, could in any form of action recover for the whole of the injury sustained in this case. The Court need decide nothing as to the question whether the assignees might be entitled to demand from the bankrupt any damages he might recover in this action. It seems clear, that as against all the world, except the assignees, the bankrupt has a clear right of action, *quare clausum fregit*. For if this were not held, and if the assignees allowed him to remain in possession of premises he before occupied, as considering them a kind of *damnosa hæreditas*, as in *Turner v. Richardson (a)*, not worth their attention, it would follow, that every civil outrage might be committed upon the property without the least means of redress. The assignees here have not interfered, and therefore no other person has a right to do so. This subject was much considered in *Fowler v. Down (b)*, and though there be a difference in one fact, the general doctrine there laid down applies most strongly to this case. Lord Chief Justice *Eyre* there said, “What shall be done between the bankrupt and the assignees is one thing; and what between him and a stranger is another. This narrow ground, that the bankrupt has a right against every body but the assignees, which is maintained by authorities, is sufficient to support the verdict.” In an-

(a) 7 *East*, 335.—(b) 1 *Bos. and Pul.* 44.

other place his Lordship said, "It is not competent to a third person to dispute the bankrupt's title to recover, who, supposing his creditors had no claims upon him, would be entitled to his action, because, whether they have such claims or not, is nothing to the stranger." Mr. Justice *Buller* agreed, and quoted, and adopted Lord *Kenyon's* opinion in *La Roche v. Wakeman*, who said, "If the assignees take any step to disaffirm the title, they may do so; but if they do not, the bankrupt is the ostensible owner.—It is not competent to a third person to object." Mr. Justice *Heath* said, "The bankrupt has a defeasible property, which none but his assignees can defeat." To the same effect is the case of *Webb v. Fox(a)*, where it was held, that a bankrupt has a right to maintain an action of trover for goods against all the world but his assignees; and Lord *Kenyon*, in giving his opinion, in that case, relied on *Fowler v. Down* above quoted, and said, "I am of opinion that nobody has a right to take this property from the bankrupt but those who regularly claim under the commission. I subscribe to the opinion given by the Court of Common Pleas, that the bankrupt has a right to these goods against the defendants who are wrong-doers. If the plaintiff had brought an action of trespass instead of trover, his possession would have entitled him to recover against a wrong-doer, and the form of the action cannot alter the law. Upon the argument for the defendant, it is an invitation to all the world to scramble for the bankrupt's goods, though the assignees do not choose to dispute the question;" and Mr. Justice *Ashurst* emphatically said, "I take the general rule to be, that the bankrupt has the right against all persons but the assignees: here a lawful possession is in him, and that is sufficient against wrong-

1819.
CLARK
v.
CALVERT.

(a) 7 T. R. 391.

1819.
 CLARK
 v.
 CALVERT.

doers." It is true, that both these cases of *Fowler v. Down*, and *Webb v. Fox*, were cases of property;—be it so. That is still stronger, for if the Courts so hold in cases of property, *a fortiori*, would they be bound to hold so, where the subject matter is a *tort* really so called, and where the action is possessory, and can only be brought by him who is in the actual possession of the land, the subject of the inquiry.

It is true also, that in both these actions, the subject was property acquired *after* the bankruptcy; but in both, the bankrupts were uncertificated, and it requires no argument to prove, that generally speaking, (though subject to exception) property acquired after the bankruptcy and before the certificate, is the property of the creditor. This was fully settled in *Kitchen v. Bartsch* (a).

The general doctrine was confirmed, if confirmation were necessary, by Lord Chief Justice Gibbs in *Cumming v. Roebuck* (b), where he said, "Unless the assignees interpose, the plaintiff may maintain the action; he may sue as their trustee."

With this weight of authority upon the general point, namely, that the assignees have not interposed their claims; if any they had, and considering the nature of this action against a wrong-doer for an injury to the actual possession of the plaintiffs, it should seem that this action is well brought, and that therefore the demurrer to the first and second pleas ought to be allowed.

The second point is, whether growing trees in a nursery ground are distrainable for rent under 11 *Geo. 2. c. 19, s. 8.*; that point was argued in this Court in *Trinity* term last, in a case of *Clark v. Gasgarth* (c). The Court there resolved, that such trees as are described in this case were not distrainable, and there has been nothing

(a) 7 *East*, 53.—(b) 1 *Holt*, N. P. C. 172.—(c) *Ante*, vol. 2.

urged to induce an alteration of that opinion. Upon both the points of this demurrer, therefore, there must be judgment for the plaintiffs.

My brother *Richardson* having been counsel in this cause, declines giving any opinion.

1819.
~
CLARK
v.
CALVERT.

Judgment for the plaintiffs.

Idle and others, v. THE ROYAL EXCHANGE ASSURANCE COMPANY.

Friday,
Feb. 12.

THIS was an action of covenant, on a policy of insurance dated the 22d of *August*, 1810, effected in the name of the plaintiffs, and sealed with the common seal of the defendants: "Lost or not lost, at and from *Quebec*, or the ship's port of lading in the river *St. Lawrence*, to her port of discharge in the United Kingdom, warranted to depart on or before the 15th of *November* then next, or to depart with the convoy appointed to sail on that day, being £4500 on freight of the ship *Ajax* valued at that sum, and £2760 on wood, valued at £6 : 6s. per register ton, loaden on board the said ship." The time of the warranty of the ship's sailing was afterwards duly extended by an indorsement on the policy to the 21st of *November*, 1810. The plaintiffs and ten other owners were

Freight is insured on ship and a cargo of timber from *Quebec* to *London*. The ship sailed from *Quebec*, and on her voyage down the river *St. Lawrence* sprung a leak, and it became necessary for the preservation of the lives of the master and crew to run her on shore.

She took the ground on the outside of a reef of rocks, and was there fixed and exposed to the full force of the stream, and in the way of the drift ice, then forming and floating down the river. One of the part owners and agent for the others resided at *Quebec*, and after two surveys, in which the surveyors stated, as their opinion, that it would be prudent to sell the ship and cargo, the master, under the direction of such part owner, sold the same. The ship however survived; was repaired by the purchasers, and afterwards brought a full cargo to *London*. In an action on the policy against the underwriters on freight for a total loss: Held, first, that under the circumstances, the master was warranted in selling the ship and cargo; and, secondly, that an abandonment of the freight was unnecessary.

1819.
IDLE
v.
THE ROYAL
EXCHANGE
ASSURANCE.

averred to be interested in the cargo, and the same persons, together with one *William Haynes*, to be interested in the freight. The plaintiffs declared, that the ship, with a cargo of wood on board, sailed on her voyage, and that whilst she was proceeding thereon with such cargo on board, she was wholly lost by the perils of the seas. The defendants pleaded the general issue, upon which issue was joined.

At the trial of the cause at *Guildhall*, at the sittings after *Michaelmas* term, 1817, before the present Lord Chief Justice, the jury found that there had been a partial loss as to the cargo, (the amount whereof was referred, by previous agreement between the parties, and was considered as paid into Court) and that there had been a total loss upon the freight, and gave their verdict for the plaintiffs £4500 damages for such total loss, subject to the opinion of the Court as to such loss upon the following case:

The plaintiffs, together with the other persons averred to be interested in the freight, were the owners of the ship *Ajax*, and at the time of the loss hereinafter mentioned, were interested in the freight to the amount of the sum insured thereon, and together with the other persons averred to be interested in the cargo, were likewise fully interested in the cargo laden on board the said ship, consisting of timber for his Majesty's Dockyards.

On the 16th of *November*, 1810, being within the time limited by the extended warranty, the ship set sail from *Quebec* to *London*, being her port of discharge in the United Kingdom, and on her voyage down the river *St. Lawrence*, having by an unavoidable accident struck the ground, she immediately sprung a leak; and meeting with tempestuous weather, after every endeavour had been used to get her into a place of safety, and when all the

crew, with a number of men who had been procured from the shore to assist them, were exhausted by working at the pumps; when there were six feet of water in the hold, and it was still gaining fast upon them, it became absolutely necessary for the preservation of the lives of the master and crew to run the vessel on shore, and on the 21st of *November* she was accordingly run ashore in *Kamouraska Bay*, about 90 miles below *Quebec*; she took the ground upon the outside of a reef of rocks at the entrance of the bay, and being situated in the tide way and immoveable, was there exposed to the full force of the stream of the river *St. Lawrence*, and in the way of the drift ice floating down the same, which ice was then beginning to form in great masses.

1819.

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IDLE

v.

THE ROYAL
EXCHANGE
ASSURANCE.

On the 22d of *November* the master went to *Quebec*, and acquainted Messrs. *Mure* and *Jolliffe*, two of the owners who were resident there, with his misfortune, and after his return caused two surveys to be made upon the ship by persons of competent experience and skill, one on the 3d, and the other on the 11th *December*; and it being the opinion of the surveyors upon both those occasions that the ship lay in a situation of imminent peril of being carried away and destroyed by the ice, and the surveyors upon the second survey having stated, that according to their judgment it would be prudent, and for the benefit of the insurers, merchants, and all concerned, to sell the ship and cargo as soon as possible, she being then liable to be carried away by the ice or upset, he did accordingly, under the direction of Mr. *Mure*, a part owner of the ship and cargo, and agent at *Quebec* for the other owners thereof, proceed to a sale of the ship and cargo by public auction at *Quebec* on the 17th of *December*, 1810, at which sale *Mure* attended. The cargo consisted of timber, which could not be got out of the ship in the situation in which she then lay. The ship and cargo were sold together in one lot as they were then

1819.

 IDLE
 v.
 THE ROYAL
 EXCHANGE
 ASSURANCE.

lying, for £1500 currency, and the sails, rigging, boats, provisions, and stores, which had been brought on shore, were sold in two distinct lots for £560 currency.

The jury found that the master had acted throughout this whole transaction fairly, and *bona fide* for the benefit of all concerned, and that the sale was honestly, fairly, and properly conducted, and directed with a view to the interest of all parties concerned.

The first intimation which the plaintiffs had that the sale of the ship and cargo was necessary, was contained in a letter from *Mure* and *Joliffe* at *Quebec*, dated the 20th of *December*, 1810, written after the sale had actually taken place, and inclosing the account of sales. This letter was not received by the plaintiffs until the 7th of *April*, 1811, and on the 9th their clerk called at the office of the *Royal Exchange Assurance*, and left with the proper person a statement of loss, amounting to £7063 : 10s. : 10d., and containing a calculation of the loss upon the cargo, being £2563 : 10s. : 10d., and giving them credit for the salvage, and demanding the difference of such loss, and also a total loss upon the freight, amounting to £4500, without leaving any other notice of abandonment.

The ship, contrary to all reasonable expectation, survived the winter of 1810, and in the spring of 1811, was, at a great expense, floated and carried up to *Quebec* by the purchasers thereof, and after being repaired at an expense of £546 : 6s. : 2d. currency, performed a voyage to *England* in the summer of 1811, and brought a full cargo.

The partial loss upon the cargo having been agreed to be referred; and to be considered as paid into Court; the only question for the opinion of the Court was, whether the plaintiffs were entitled to recover for a total loss upon the freight? If they should be of opinion that they were so entitled, the verdict was to be entered for the plaintiffs

for £4500 as for a total loss on freight, but if otherwise, for the defendants.

It having been previously agreed between the parties that this case should be turned into, and taken at first as a special verdict, it came on for argument last term, when Mr. Serjt. *Marshall* having argued for the plaintiffs, and Mr. Serjt. *Bosanquet* for the defendants, the Court directed a second argument, and in this term it was accordingly re-argued by Mr. Serjt. *Lens* for the plaintiffs, and Mr. Serjt. *Copley* for the defendants.

1819.
~
IDLE
v.
THE ROYAL
EXCHANGE
ASSURANCE.

For the plaintiffs, two questions were raised: *First*, whether under the circumstances, the captain had a right to sell the ship and cargo? And, *Secondly*, whether there ought not to have been an abandonment of the freight? *First*, the extent of the captain's authority is a question of considerable importance, both as it affects the law of insurance and the marine law. Here he had an authority to sell, as he was justified by the necessity of the situation in which he was placed by the perils of the sea, and that being one of the perils insured against, the underwriters are liable. The sale was induced by urgent and unavoidable necessity, because the immediate destruction of the ship and cargo appeared inevitable. He supposed, that by the sale, the chance of saving the ship and cargo might be of some value to persons on the spot, but that they could be of no benefit either to him or his owners; the necessity was so urgent that it created an obligation on him and all concerned, to sell without delay; for the salvation of the ship was contrary to all human expectation. It was the opinion of several persons that she might not survive an hour, as the ice was accumulating round her, and that if it once took her, she would have been carried down the river. If the captain could not sell, what was he to do? was he to suffer the ship to perish, or attempt to repair her at an incalculable expense? If he had delayed, and she had been carried away, the underwriters on the ship

1819.

 IDLE
 v.
 THE ROYAL
 EXCHANGE
 ASSURANCE.

and cargo would have reason to complain that he had not done his duty. The defendants say, that however well intended the sale might be, yet it was no benefit to them as underwriters on freight, inasmuch as it occasioned a total loss on freight; and that however beneficial the sale might be to the general concern, it must be injurious to them, as they must pay a total loss, if the voyage were put an end to. It was urged at the trial that this was not for the benefit of all concerned, as it could not be for the benefit of the underwriters on freight, but the interest of all concerned must mean the interest of those concerned in the ship and cargo, and the interests of the underwriters are not to outweigh those of the owners. In the case of *Milles v. Fletcher* (a), Lord *Mansfield*, in delivering the judgment of the Court, said, "The captain had an implied authority from both sides to do what was right to be done, as neither the insurers nor insured had agents at *New York*; and whatever was right for him to have done, if it had been his own ship and cargo, the underwriter must answer for the consequences of, because this is within his contract of indemnity;" and his Lordship left it to the jury to determine, whether what the captain had done was for the benefit of the concerned, and asked "if they had found that it was in words, where would have been the question of law?" In this case, it has been found expressly as Lord *Mansfield* wished it had been found there. In *Plantamour v. Staples* (b), it was held that the owners of goods insured, by the act of shifting the goods from one ship to another, did not preclude themselves from recovering an average loss arising from the capture of the second ship, if they acted from necessity, and for the benefit of all concerned. In *Underwood v. Robertson* (c), the captain of a recaptured ship, because he

(a) 1 *Dougl.* 4th Edit. 232.—(b) 1 *Term Rep.* 611. n.
 —(c) 4 *Camp.* 138.

could not immediately proceed, sold her and the cargo under an order of the *Vice-Admiralty Court*, and Lord *Ellenborough* there held, that he was not warranted in selling the cargo; and that he was bound to have waited a reasonable time, for the purpose of procuring a competent crew to navigate his vessel. If, therefore, he had waited a reasonable time, the circumstances of the necessity which had occasioned the sale of the ship would then have been justifiable. In the case of the *Betty Cathcart* (a), Sir *Wm. Scott* said, "Cases of unavoidable accident, invincible necessity, or the like, where the party could not act otherwise than he did, or has acted at least for the best, must be considered in the system of the revenue and navigation laws, just as in other systems: Laws that would not admit an equitable construction to be applied to the unavoidable misfortunes or necessities of men, or to the exercise of a fair discretion under difficulties, could not (he said) be laws framed for human societies." In the case of the *Gratitudine* (b), that learned Judge delivered his opinion nearly conformably to the case of the *Betty Cathcart*, and said, "That though, in the ordinary course of things, the master was a stranger to the cargo, beyond the purposes of safe custody and conveyance; yet, that in cases of instant and unforeseen and unprovided necessity, the character of agent and supercargo is forced upon him, not by the immediate act and appointment of the owner, but by the general policy of the law; unless the law can be supposed to mean that valuable property in his hands is to be left without protection and care. In cases where the party does not legally possess the cargo, the character of agent respecting it is thrown upon the master by the policy of the law, acting under the necessity of the circumstances in which he is

1819.

IDLE

v.

THE ROYAL
EXCHANGE
ASSURANCE.

(a) 1 *Robinson's Adm. Rep.* 220.—(b) 3 *Rob. Adm. Rep.* 257.

1819.
 {
 IDLE
 v.
 THE ROYAL
 EXCHANGE
 ASSURANCE.

placed. The law of cases of necessity is not likely to be furnished with precise rules: necessity creates the law; it supersedes rules; and whatever is reasonable and just in such cases is likewise legal." These *dicta*, therefore, shew what has been considered to be the power and authority of the captain, not only according to the common law, but in the Admiralty Court; the captain here, therefore, being situate in such an extreme necessity, was authorised to act as he did, both as to the ship and cargo. The case of *Green v. the Royal Exchange Assurance Company* (a) is precisely in point on both grounds, and decisive of the present questions; for the jury found in this case all that was wanting in that: and this Court there held, that if the captain did the best for all the parties concerned, the underwriters were liable. Now the jury have here found that the master acted for the benefit of all concerned; and that the sale was honestly and fairly conducted and directed with a view to their interest. Besides, one of the owners was present at the time, and acquiesced with the master in the sale, with a view to such interest. It is therefore not sufficient for the defendants to say, that the master alone had not the power to make a sale of the ship and cargo; but it will be necessary for them to assert, that he would not be authorised to do so under any circumstances, and even with the concurrence of one of the owners. It is true, the power of the captain to sell, has, by recent decisions, been narrowed to cases of extreme necessity, *Reid v. Darby* (b), and in the subsequent case of *Wilson v. Millar* (c), Lord *Ellenborough* said that nothing but extreme necessity would warrant the master in making a sale of any part of the cargo. The facts in all the previous cases are different from the present; for the master had there done acts which the owners disavowed, or at

(a) 1 *Marsh.* 447. — (b) 10 *East*, 143. — (c) 2 *Starkie's N. P. Rep.* 3.

least to which they had given no such assent or sanction as was given in the present case; and the questions which afterwards arose in those cases were, whether the owners disavowed the acts done by the master. Here, it was not the unqualified act of the master, but one of the owners assented to and sanctioned the sale; that owner, too, was the authorised agent of the other owners, and acted on behalf both of himself and them; but still the captain alone had, under the circumstances, an implied authority, as this was a case of urgent and extreme necessity, which required an instantaneous interposition; for the peril was imminent and immediate: no one but the persons to whom the ship was sold could save her from being a wreck: the cargo was inseparable from her, and they were so united, that they must either both have perished or been preserved.—*Secondly*, as to the question, whether the freight should have been abandoned, Lord Chief Justice *Gibbs*, in the case of *Green v. the Royal Exchange*, said, that the Court were of opinion, that there was no ground for saying an abandonment was necessary; so here, there is nothing to abandon; for, if the sale were right, the ship and cargo had gone into different hands, and she could never earn freight. Where the freight is abandoned to the underwriters it belongs to them, and they become her owners from the commencement of the risk. The sailors have a specific claim upon the ship for wages, and for which the owners are liable; for although the sailors cannot sue at common law for wages, yet they can libel the ship in the Court of Admiralty, which Court will give a remedy against her; and if the ship be hypothecated, that hypothecation follows her, and the underwriters take her, subject to all these burdens and outgoings. Those charges are not imposed on the owners, but are left to the underwriters, who are liable for them, after aban-

1819.
 }
 IDLE
 v.
 THE ROYAL
 EXCHANGE
 ASSURANCE.

1819.
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 IDLE  
 v.  
 THE ROYAL  
 EXCHANGE  
 ASSURANCE.

donment. In *Thompson v. Rowcroft* (a), Lord Ellenborough said, "That the right of property in the subject matter might be in the underwriters on the ship; and yet the defendant might be liable to the underwriters on the freight in that action, for the defendant had received the entire freight, and therefore must pay it over. The underwriters on the ship, from the time of the abandonment to them, stand in the same situation as the owner; and as the owner was liable to all the expenses of the voyage before, so, after the abandonment, they must be borne by the underwriters on the ship: that expenses of this sort were not, properly speaking, salvage on the freight, but charges paid by the owner of the ship for the benefit of those to whom he abandons, and therefore he will be entitled to retain a proportionable part on his settlement with them." The case of *Leatham v. Terry* (b), which was substantially the same as *Thompson v. Rowcroft*, as to facts, was decided in the same manner. The case of *McCarthy v. Abel* (c), where the ship was liberated from a hostile embargo, and performed her voyage and earned freight, the owner having previously separately insured the ship and freight, abandoned them to the respective underwriters, which was accepted by them: It was held that the assured could not recover as for a total loss of freight, the freight having been, in fact, earned; or, supposing it to have been in any other sense lost to the assured, by the abandonment of the ship to the underwriters thereon, it was so lost, not by any peril insured against, but by the voluntary act of the assured in making such abandonment. The case of *Sharp v. Gladstone* (d) was nearly similar to that of *McCarthy v. Abel*; and Lord Ellenbo-

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(a) 4 East, 34.—(b) 3 Bos. & Pul. 479.—(c) 5 East, 388.—(d) 7 East, 24.

roughly there observed, "That after the abandonment of the ship by the owner to the underwriters *on ship*, he felt great difficulty in saying that he could abandon the freight, which seemed to follow the property in the ship; being the earnings made by the subsequent use of that which was then become the property of others, to another set of underwriters; but as to the general question, whether an abandonment could be made to the underwriters on freight, after an abandonment to the underwriters on ship, he begged to be understood that he gave no opinion. In *Parmeter v. Todhunter* (a), which was an action for a total loss on a policy on freight, the ship having been captured and recaptured, and sold with her cargo, Lord *Ellenborough* held, that there was no implied abandonment by a demand of a total loss, and that there must have been an abandonment of freight where the goods specifically exist, although the ship was incapable of prosecuting the voyage, and because the goods might have been brought home in another ship, and so the freight might have been earned; but Lord Chief Justice *Gibbs* overruled that decision in the case of *Green v. the Royal Exchange Assurance*. But the want of the notice of abandonment is not applicable to this case, as the law does not require such notice as a mere abstract question; for if a ship be sunk or captured, and not retaken, there can be nothing to abandon. It is doubtful whether there should be any abandonment whatever in cases of freight; and even if it should be necessary in some cases, it cannot apply to this. This case, therefore, cannot be distinguished from *Green v. the Royal Exchange Assurance Company*; and on both grounds the plaintiffs are entitled to recover.

Lord Chief Justice DALLAS.—In the case of *Hayman v. Molton* (b), it was held, that a captain might sell a

1819.  
 ~~~~~  
 IDLE
 v.
 THE ROYAL
 EXCHANGE
 ASSURANCE.

(a) 1 Camp. 541.—(b) 5 Esp. Ni. Pri. Rep. 65.

1819.

 IDLE
 v.
 THE ROYAL
 EXCHANGE
 ASSURANCE.

ship for the benefit of the owners; but that it could only be done in cases of extreme necessity: and that such sale must be made after survey; which survey must be made on the best information, and with the most pure good faith. And Lord *Ellenborough* there cited the case of *Tremenhere v. Tresilian (a)*, where it was decided, that a captain of a ship had, by law, a right to hypothecate her in a foreign country, for the purpose of raising money for her necessary repairs; but that he had no such general authority by law as to sell. In this case it is stated, that the surveyors reported that it was prudent to sell, and not that it was absolutely necessary to do so; unless, therefore, it could be shewn that there was an absolute necessity to dispose of the vessel, no case has been cited which decides that the captain had a right so to do. In the case of *Reid v. Darby*, that distinction was taken; but that was not altogether a case of necessity, but merely of supposed expediency. In this, the expediency was admitted, but it stopt short of necessity; here, the ship was actually existing in specie, and, as the cargo consisted of timber, it was not of a perishable nature. She survived the peril under which she laboured: and might not this sale, therefore, be considered as a mere speculation, during the impending peril of the sea? And in a note to *Reid v. Darby (b)*, a case was cited by Lord *Ellenborough* from *Jenkins' Reports (c)*, where it was observed, that the master, in case of danger and extremity, might cast the goods into the sea, and in some cases sell the ship, although it did not belong to him, as in case of famine, &c. The word "famine," therefore, seems to me to imply a moral necessity.

For the defendants it was argued, *first*, that there has

(a) 1 *Sid.* 453.—(b) 10 *East*, 148.—(c) 165.

never been any loss of the freight to the assured; *secondly*, if there have been, it has arisen from the act of the assured themselves; and, *thirdly*, that the plaintiffs cannot recover without having abandoned. *First*, there has been no loss of freight on two grounds; for in *Anderson v. Wallis (a)*, it was held that a mere retardation of a voyage, to another country, where the insurance was on a cargo, not of a perishable nature, although the ship sustained considerable injury, and some part of the goods were much damaged, did not amount to a total loss of the goods; and Lord *Ellenborough* there said (*b*), that "Disappointment of arrival was a new head of abandonment in insurance law;" and his Lordship there laid down the principle, that the retardation of a voyage, to whatever account it might be laid, could never amount to a total loss: and said, "There was not any case which authorised an abandonment, unless where the loss had been actually a total loss, or in the highest degree probable at the time of abandonment." However long, therefore, a ship may be retarded, if she finally arrive at her destination, there is no loss under the policy; but it may be said, in this case, that though the ship arrived, she had brought another cargo: and that, therefore, the freight was not earned. In *Everth v. Smith (c)*, which was an insurance on freight from *A.* to *B.*, and the ship was chartered to sail with a cargo from *London* to some port in the *Baltic* not beyond *A.*, there to take in a homeward cargo; and she was detained at *A.* for five weeks, and prevented from loading, by order of the government; and in a few days after the detention ceased, the frost set in, which detained her there till the spring, when she procured a freight from other persons, and returned with it to *London*, but the expenses of detention ex-

1819.

W
IDLE
v.

THE ROYAL
EXCHANGE
ASSURANCE.

(a) 2 *Macle & Sel.* 240.—(b) *Id.* 247.—(c) *Id.* 278.

1819.
~
IDLE
v.
THE ROYAL
EXCHANGE
ASSURANCE.

ceeded such freight: It was held that the policy had attached from the moment of detention, but that freight having been afterwards earned, the underwriters were not liable; it is, therefore, immaterial whether the cargo be the same or not.—The ship here earned freight, and brought home a complete cargo; and this freight was earned on the same voyage. If, therefore, freight has been lost, it was by the act of the assured; because the ship not only survived the winter, but arrived, brought home a full cargo, and therefore earned freight on the same voyage; how, then, can the underwriters on freight be liable when the ship has performed all they undertook she should do? It is answered, that one of the assured being an owner of the ship and cargo, and representing all the other absent owners, *bona fide* thought that it would be for the benefit of all parties concerned to put an end to the adventure, and make a transfer of the ship by sale, for such price as any one might think fit to give for her. Being so transferred, the owners cannot avail themselves of the freight insured by having recourse to the underwriters. The ship was quite reparable, for she was ultimately repaired at an expense of only £546: nothing prevented her from performing the voyage, but the peril in which she was then placed, and there is no case where the captain, much less the owner of a vessel, has been held justified in parting with her, because she was in peril, or in danger of not performing the voyage, the risk of which was insured against. The underwriter lives by insuring risks, against which he alone provides. The ship was not prevented from arrival by the perils of the sea, but by the transfer made by the assured himself; the risk, therefore, has been sold, and not the ship. The cargo was not of a perishable nature, and was all on board the ship: besides, the master was in possession, and at the time of the sale she was a good vessel; and in that

estate he sold her, subject to the risk. The assured can never be authorised during the existence of a voyage to put an end to the risk, because the thing insured is in peril and danger. In *Milles v. Fletcher* (a) the ship was so much damaged, that she was rendered irreparable for the voyage insured on; and the expenses of repairing her would have far more than counterbalanced any benefit to be derived from them: her remains, therefore, under those circumstances, might be disposed of. On that principle, the case of *Green v. the Royal Exchange Assurance* (b) proceeded; namely, that the ship had been so much damaged by the perils of the sea, as to be incapable of bringing home the cargo insured; and she returned to this country with one half less than her original cargo, and she was also unable to earn the freight in contemplation: the captain was, therefore, justified in selling the wreck, and no blame could be imputed to him. The clear distinction is, that a captain cannot sell a vessel on account of any peril she may then be in; but can only do so, if she be so much damaged that she cannot perform the voyage, or if she be in an irreparable state, by which such voyage would be wholly lost. The case of *McCarthy v. Abel* (c) is much stronger than the present; for there the plaintiffs had assigned their interest to two persons in trust for all the underwriters on the ship; and it was not a sale, but an abandonment to them of the ship, which was considered substantially as a sale: and Lord *Ellenborough* there said (d), "That the question resolved itself into this single point, viz. Whether the freight had been lost or not? That if the fact were merely looked at, freight, in the events which had happened, had not been lost, but had been fully and entirely earned, and received by or on the behalf of the plaintiffs, the assured: and if so, no

1819.

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IDLE

v.

THE ROYAL
EXCHANGE
ASSURANCE.

(a) 1 *Doug.* 231.—(b) 1 *Marsh.* 447.—(c) 5 *East*, 388.—(d) *Id.* 397.

1819.
 ~~~~~  
 IDLE  
 v.  
 THE ROYAL  
 EXCHANGE  
 ASSURANCE.

loss could be properly demandable against the underwriters on freight, who merely insure against the loss of that particular subject by the assured: but if it had, or could be considered as having been in any other manner or sense lost to the owners of the ship, it had become so lost to them, not by means of the perils insured against, but by means of an abandonment of the ship; which abandonment was *the act of the assured themselves*, with which, therefore, and the consequences thereof, the underwriters on freight had no concern." How is that case to be distinguished from this in principle? Although there, it was not a sale by auction, but a transfer by the assured in trust for the underwriters on the ship, it makes no difference; and no distinction can be drawn between the underwriters on ship and those on freight. It is also immaterial whether a ship be transferred to third persons in trust for the underwriters on the ship, who, as to the underwriters on freight are total strangers, or putting her up to auction, and transferring her to a purchaser; it is enough for the underwriter on freight that such transfer has taken place. The assured here, together with the captain, having sold the ship, alone prevented freight being earned; the defendants were not at all concerned in the sale, and the then impending peril of the sea was a mere retardation of the voyage: neither has there been any total loss of ship or cargo, and yet the plaintiffs insist there has been a total loss of freight; neither has there been an abandonment of ship or cargo—indeed there could be no abandonment, because the ship was never placed in a situation in which an abandonment could have taken place; for all the cases upon this question have been those, where a ship has been irreparably injured by the perils of the sea, and the voyage thereby lost. In *Furneaux v. Bradley (a)*, and the sub-

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(a) MS. *Park* on Insurance, 7th edit. 257

sequent cases there collected, it is laid down, that where a ship receives an injury by perils of the sea, so as to render her irreparable for the purposes of the voyage, an abandonment may be allowed; but whether there be a total loss or not, is immaterial, as in *McCarthy v. Abel* (a) the abandonment transferred it to a third person, so that there could be no demand on the underwriters on freight.—With respect to the master's authority to sell, it is not necessary here to consider whether he may or may not have an implied authority, as in some particular cases, to act for all concerned; for one of the assured was himself on the spot, and therefore divested the master of his authority. It is true that, if he had not been present, the captain might have taken the responsibility on himself; but it has been expressly laid down by Lord *Ellenborough*, whose decision has been confirmed by the Court of King's Bench, that a captain has no right whatever to dispose of a ship when she is to be considered at all capable of performing the voyage insured: it is true, he may dispose of a wreck, or that, under certain circumstances, he may hypothecate and dispose of a part, or the whole of a cargo; but under no circumstances has he the power to dispose of the ship, when she is existing in specie, and encountering peril. In *Reid v. Darby* (b), the ship had undergone great peril and danger, and had sustained considerable damage, and proceedings were taken in the Admiralty Court, and every thing, *bond fide* done to authorise the sale of the vessel, and yet the Court expressly held that there was an alternative, and decided that the captain could not sell the ship. The case of *Wilson v. Millar* (c) is still stronger, and decisive as to this point; but this was not a sale by the master, but by the assured himself, for the former is found by the special verdict to be acting under the direction of the

1819.  
  
 IDLE  
 V.  
 THE ROYAL  
 EXCHANGE  
 ASSURANCE.

(a) 5 East, 388.—(b) 10 East, 143.—(c) 2 Starkie, 1.



1819.  
IDLE  
v.  
THE ROYAL  
EXCHANGE  
ASSURANCE.

latter. Supposing this were a case of capture and re-capture, the master could not sell the chance of re-capture, of which the underwriter would be entitled to the benefit; he therefore could not put an end to the risk, and say, the underwriters should not have the benefit of such re-capture: so, if a ship be in peril from a storm, the master could not interpose and sell the property at a reduction, so as to deprive the underwriters of the chance of her escaping from such peril; and where a vessel is in extreme danger, the captain alone cannot intervene and dispose of the risk, for the underwriters have a right by their contract to take the risk throughout. But if he have any right, it can only accrue when the peril is over, and when the vessel has sustained considerable damage; he has then an authority to exercise a discretion, and determine whether it be or be not advisable to repair her in order to complete the voyage. The defendants here do not stand in the situation of underwriters on the ship, nor underwriters upon the cargo, for there they would be entitled to the produce of the sale of the ship and cargo; but if the plaintiffs are entitled to recover in this action, the underwriters on freight will be called upon to pay an entire loss, at all events, although they can receive no correlative benefit or advantage whatever. Although, therefore, it is stated that this sale was with a view to the benefit of all concerned, the whole of the facts must be taken together, and it cannot by possibility be inferred, that such sale could be for the benefit of the present defendants. The master could not sell the ship and cargo to deprive them of their risk; and if it be so with regard to him, how could it apply to the assured? Although he was upon the spot, he had no authority to decide and interfere for the underwriters on freight, nor could he be considered as acting for the benefit of all parties. Whatever was done, therefore, was done entirely by the owner on the spot, for the master acted

under his direction. As to whether an abandonment be necessary or not, the case of *Green v. the Royal Exchange Assurance* (a) appears decisive, and the judgment of Lord *Ellenborough* in the case of *Parmeter v. Todhunter* (b) was there referred to by the counsel, and considered by the late Lord Chief Justice of this Court; and in the former case it was decided, that where a ship has been sold, an abandonment was not necessary: but here it seems to be supposed that an abandonment of freight is to be deemed unnecessary, as no advantage is to be derived from it, and it does not appear on the special verdict that an abandonment is necessary: if not, then there is no total, but only a partial loss of the ship, and it appears there was not, for the underwriters on ship and cargo accepted a salvage, and paid a total loss. But the cases of *Thompson v. Rowcroft* (c), and *Leatham v. Terry* (d), are applicable to the present, and an abandonment would have therefore been important; for in those cases, inasmuch as the freight was not claimed and received by the underwriters on the ship, the underwriters on freight might say, such freight had been abandoned to them, and in both those cases they recovered all the freight subsequently earned by the ship. If the assured were justified in the sale, there was nothing to abandon. In the case of *Hodgson v. Blackiston* (e), Lord *Ellenborough* held, that a notice of abandonment is necessary, although the ship and cargo had been sold and converted into money when the notice of the loss was received. And in *Martin v. Crokatt* (f), his Lordship said, that "Where the thing insured subsisted in specie, he could not but think that an abandonment was necessary, if it were necessary in any case; and that if upon the happening of such a peril, which suspended the voyage and induced the necessity

1819.


  
IDLE

v.

THE ROYAL  
EXCHANGE  
ASSURANCE.

(a) 1 *Marsh.* 447.—(b) 1 *Camp.* 541.—(c) 4 *East*, 34.  
—(d) 3 *Bos. & Pul.* 479.—(e) *Park* on Insurance, 7th  
edit. 281. n.—(f) 14 *East*, 466.

1189.  
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 IDLE  
 v.  
 THE ROYAL  
 EXCHANGE  
 ASSURANCE.

of repair, the owners chose to make it a total loss upon the loss of the voyage, or the probable estimate of the expenses of repair, absorbing the value of the thing insured, they ought to have given notice of the abandonment, to enable the underwriters to elect whether or not they would incur such expenses." So here, the plaintiffs ought to have given the defendants the opportunity of judging for themselves. If the vessel had been abandoned, this case would have come within the distinction which was drawn in the case of *McCarthy v. Abel* (a); but the only question here is, whether in the instance of freight, an abandonment be necessary or not. It is necessary in a case of capture and re-capture. Here, where the event was fully known, it was equally so, to entitle the plaintiffs to recover as for a total loss. The case of *Green v. The Royal Exchange* (b) does not lay down as a general principle, that abandonment on freight is not necessary. In this case the vessel returned to port, and if the assured had not interfered, she might, after being repaired, have brought the same cargo to this country, when there would have been no loss of freight whatever. The risk was, therefore, put an end to by the sale, and the defendants were deprived of it by the change of cargo, because such change was rendered necessary by the act of the assured. It does not appear that at the time the ship was in peril, that without abandonment there was any thing to convert it into a total loss.—It was the sale that put an end to the adventure. If the plaintiffs were entitled to convert the peril into a total loss, and claim on the underwriters on freight, then an abandonment of freight was necessary. If there had been an abandonment when it was a risk in continuance, it might have been abandoned, as in the case of a loss by capture and recapture. On these grounds, therefore, neither the master nor

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(a) 5 East, 388.—(b) 1 Marsh. 447.

owner had any right to dispose of the vessel and cargo, so as to deprive the underwriters on freight the benefit of the contingency to which they were entitled according to their undertaking on the policy, and as the adventure was put an end to by the act of the assured, the plaintiffs are not entitled to recover.

In reply.—It was observed, that as to the three points made for the defendants, they might very properly be reduced to those which were raised for the plaintiffs; namely, that the captain had, under the circumstances, a right to sell the ship and cargo; and that an abandonment was unnecessary, as there was nothing to abandon. The case of *Green v. The Royal Exchange* (a) goes further than this, for there the ship was repaired in a certain degree, so as to be enabled to bring home half a cargo; unless, therefore, that case be overruled, the defendants cannot be entitled to judgment. The case of *Anderson v. Wallis* (b) has been cited to shew, that a mere retardation of a voyage by the owners is no ground for abandonment; but this is not a case of retardation, but the necessitous situation in which the vessel was placed, called for an immediate act, which was done after the advice of the agent of the owners, and the captain, after two surveys, and with great deliberation, and the jury have found that it was the best thing to be done with a view to the benefit of all concerned. It has been said, that the underwriters on freight, although they were parties concerned, were not benefited by the sale; but they are not to be considered as the parties concerned, because, when a captain is contemplating how he shall dispose of a ship and cargo in extreme distress, he looks only to the owners of such ship and cargo, and does that which he considers to be most beneficial for them. It has been also said, that the underwriters, for the premium,

1819.  
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 IDLE
 v.
 THE ROYAL
 EXCHANGE
 ASSURANCE.

(a) 1 *Marsh.* 447.—(b) 2 *Maule and Sel.* 240.

1819.
 IDLE
 v.
 THE ROYAL
 EXCHANGE
 ASSURANCE.

agreed to take the risk, and that they had a right to run the risk of the whole voyage, and therefore the underwriters on freight could not be subjected to suffer loss. If that be so, the opinions of Lord *Mansfield*, Mr. Justice *Buller*, and Lord *Ellenborough*, as well as the whole of the judges of this Court at the time the case of *Green v. The Royal Exchange Assurance* was determined, amount to nothing, and the consequence would be, that no man would ever be safely insured. The arguments for the defendants have been founded on the event that has happened, namely, that the ship had survived; but the question is, whether the conduct of the parties at the time of the sale was improper, and whether, under the circumstances, any blame could be imputed to them. It has been said, that in *Green v. The Royal Exchange Assurance* (a) the ship was a mere wreck, incapable of complete repair; but she was repaired so as to bring home half a cargo, and she still existed in specie. If the owners and underwriters of the ship and cargo had been at *Quebec* when the event took place, the latter would instantly have abandoned to the underwriters, and they would have proceeded to sale as speedily as possible, in order to prevent the destruction of the ship. The underwriters on the ship have a right to dispose of her without the permission of the underwriters on the freight: they had a right to sell her, or let her take her chance. The case of *Reid v. Darby* (b) has been much relied on for the defendants; but, on a full consideration of that case, it is an authority against them. The question there was, whether the ship could be sold under the authority of the Vice Admiralty Court, and there was no urgent or immediate necessity to do so; and in attending to the argument, and opinions of the learned Judges there, it will be observed, that Mr. Justice *Lawrence* and Mr. Justice *Le*

(a) 1 *Marsh.* 447.—(b) 10 *East*, 143.

Blanc differed from Lord *Ellenborough*, for Mr. Justice *Lawrence* there said (a), "It was held in *Milles v. Fletcher*, that where the ship was captured and re-captured, but the voyage was lost, and the captain, acting for the best, had sold the ship and cargo, the owner might recover against the underwriters for a total loss;" and that learned Judge further said (b), that "A ship might be worth repairing to a person on the spot, though not so to the owner in England." That, therefore, is a material consideration as applicable to this case, and Lord *Ellenborough* then remarked, that it was not found that the ship was not navigable, but only that she was not capable of being navigated home with her then cargo. Mr. Justice *Le Blanc* there agreed with Mr. Justice *Lawrence* in that opinion, and asked that "While the subject matter is in the form of a ship, though wanting repairs, which perhaps it might not be worth the owner's while to make, would not the provisions of the register acts continue to apply to it, if it were in a *British* port?" and in the judgment of the Court, Lord *Ellenborough* confined himself to the defendant's not having complied with the register acts. The judgment, therefore, in that case, was founded on the fact of the title of the defendant, and not on the ground that there was no authority to sell. The case of *Martin v. Crockatt* (c) is inapplicable to the present, as it merely decided that the assured, when they had not abandoned in the first instance, could not afterwards do so, when they find in the result that the salvage and expenses exceed the value of the ship. The case of *Wilson v. Millar* (d) has been much relied on; and Lord *Ellenborough* there said (e), "That nothing but extreme necessity would warrant the master in making a sale of any part of the cargo;" so that he

1819.

W

IDLE

3.

THE ROYAL
EXCHANGE
ASSURANCE.

(a) 10 *East*, 152.—(b) *Id.* 153.—(c) 14 *East*, 465.
—(d) 2 *Stark.* 1.—(e) *Id.* 3.

1819.
~
IDLE
v.
THE ROYAL
EXCHANGE
ASSURANCE.

there intimated, that in a case of extreme necessity, the master might sell; but his Lordship, in that case in continuation, said, that "The master there took upon himself to break up the destination of the adventure, and to exercise a full dominion by the sale of the whole of the goods; and the Court, on a motion for a new trial, were of opinion that an option ought to have been given to the party in *England* to choose another market for the sale of his goods: that, therefore, is wholly inapplicable to the present case. Here the cargo consisted of timber, and could not be taken out of the ship, and Mr. Justice *Abbott*, in the case of *Wilson v. Millar (a)*, added, "That the proprietor of goods would seldom complain, where the master had exercised an honest discretion on the subject." The main point relied on for the defendants in this case is, that the part owner and master had no right to interfere; that the mischief was occasioned by the act of the assured, under whose control he acted, and that he could not change the disposition of the property. But there was no improper or unnecessary interference on the part of the master; but, on the contrary, what was done was with a view to the benefit of all concerned. The underwriters on freight had in fact no interest; the subject matter was gone; the freight to be derived from that voyage was entirely lost. The event is not to be considered, but the situation of the ship at the time; if not, no man is safe in taking any step for her preservation. It has been contended, that if a captain do what he considers best for the benefit of the owners of the ship and cargo, that it cannot be done while the risk is pending; if this be so, when is he to interfere? It is impossible to say that he can exercise his discretion after the determination of such risk, for he can only effectually

(a) 2 Stark. 5.

interfere while it is in existence. He has a right to interpose when the effect of his interposition may be beneficial to the parties interested: is he therefore to wait till the consequences of the peril are ascertained? If he were, the ship might have gone to the bottom. He is not bound to wait any precise period for interposition: he is to regulate his conduct by the circumstances under which the vessel is placed. It has been further said, that a captain cannot sell in case of storm: it is quite clear that he could not do so, because he could not quit his ship while the storm subsisted: so in cases of capture, re-capture, or embargo, it has been said, that the captain cannot act; but if the property in those cases remain in such a state that something may be done, and the re-captor restore the vessel as before, then every thing is safe; but if upon the capture and re-capture the capture be entire, the loss must be total, and in such a case either a sale or an abandonment may take place, or any other mode may be adopted which circumstances render necessary. The only thing for the captain to do, is to ascertain what is best to be done, and to do that which he considers most beneficial for all parties. The case of *M'Carthy v. Abel* (a) is wholly distinct from the present, for this cannot be assimilated to a hostile embargo; for an embargo is merely a suspension of power, and may not terminate in the seizure or ultimate destruction of the ship. In that case there was merely a suspension of the risk for a time, but afterwards the freight was earned: here, the ice might have come down upon the ship and destroyed her immediately, and the master would then have lost the power of doing any thing for the benefit of the concerned. If there had been any person representing the underwriters, an abandonment might have been made as for a

1819.

IDLE

v.

THE ROYAL
EXCHANGE
ASSURANCE.

(a) 5 East, 388.

1819.
~
IDLE
v.
THE ROYAL
EXCHANGE
ASSURANCE.

total loss; but this case is stronger than any cited, for the master acted with the sanction of one of the owners who was on board. This was in fact not a sale of a risk, but a sale of the ship and cargo under circumstances of necessity, at a time when such risk had been wholly lost: the sale took place when there was no freight earned, and there was in fact no risk of freight to be sold. If there be any distinction in this case, "*with a view to the benefit*," or "*actually for the benefit*" of all concerned, it is at most a mere distinction of words, and not applicable to the facts as proved, they are in substance the same. If the ship had not been sold, she would, in all probability, have been destroyed. The underwriters on freight cannot say that any thing more beneficial to their interests could have been done; neither can they suggest any amelioration or improvement of what has taken place. If the ship had not been insured, the course which the captain has taken would have been perfectly right and consistent. The defendants were not interested as independent parties, and no third interest of theirs should control that of those who were interested in the ship and cargo; but the jury found there was an urgent necessity to compel the step which was taken, for the ship could never have been preserved but by the persons to whom it was sold. If masters of vessels have in future no right to exercise a discretion, the necessary consequence will be, that in cases of distress they will leave vessels to their fate, if they cannot be certain that what they do will be deemed for the best by those who are interested, and they will be prevented from interfering until the mischief has actually happened and been concluded. What has been done, was intended for the benefit of the defendants, as well as all the other parties interested. Although they have received no equivalent, they are still in the situation in which they were, as, under

the circumstances, every thing has been, which could possibly be preserved, and every benefit has been derived by those interested, agreeably to their capacity of receiving such benefit. The case of *Parmeter v. Todhunter* (a) did not establish that an abandonment of freight was at all times necessary; but here, no abandonment took place, because the ship was in such a peculiar situation that the freight could not be earned, and therefore abandonment was unnecessary. If a communication had been made to the underwriters on freight at the moment, they could neither have interposed, nor put themselves in a better situation than they now are; and the captain and owner have done every thing that could possibly be done for their benefit, and they acted not only prudently but properly in the sale of the ship and cargo. There is no case in which it has been held that an abandonment of freight is absolutely necessary. If the same cargo be stipulated to arrive in the same vessel, and on the same voyage, it cannot happen; as it is not requisite to lay down abandonment as a distinct matter of law: it is rather a conduct to be pursued where something has happened, which, in substance, is a total loss, but still there must be something recoverable. Here, no abandonment of freight could be required, as in all probability there would have been a total loss. The cases of *Hayman v. Molton* (b), and *Wilson v. Millar* (c), decided that the captain might sell in cases of extreme necessity, and that of *Anderson v. Wallis* (d) is a stronger authority in favour of the plaintiffs than either of these. They, therefore, from the authorities cited, but more particularly under the precise circumstances, found by the special verdict, are entitled to recover.

Cur. adv. vult.

1819.
 W
 IDLE
 v.
 THE ROYAL
 EXCHANGE
 ASSURANCE.

(a) 1 Camp. 541.—(b) 5 Esp. 65.—(c) 2 Stark. 1.—
 (d) 2 Maule and Sel. 240.

1819.

IDLE

v.
THE ROYAL
EXCHANGE
ASSURANCE.

The case stood over until this day, when Lord Chief Justice DALLAS delivered the following judgment:

This case has been twice argued, and most ably on both occasions. It comes before the Court on a special verdict, which, in substance, is this. [Here his Lordship read the special verdict.] The objections made to the plaintiff's right to recover are these: *first*, it is said that the captain had no right to sell the vessel and so determine the voyage, or, in other words, that the voyage was not put an end to by the perils of the sea, but by the act of the assured; and, *secondly*, that if the sale was proper, still there ought to have been an abandonment of the freight; and, with respect to the second objection, it resolves itself into matter of form, for under the facts found in the special verdict, inasmuch as there could be no freight to abandon, no actual benefit could be derived from abandonment in terms, and therefore the chief objection as against the assured's right to recover is, that something has not been done, which, if it had been done, would have placed the insurer in no better situation. The first objection then is, that the captain had no right to sell; and as to this, the argument has gone upon very wide grounds, and a great number of cases have been referred to. But before going into the general doctrine, or the particular authorities, I think it right to premise, that our opinions must be considered as formed on the facts of this case; for although general principles are highly valuable when they can be of general or extensive application, yet, from the very nature of subjects of this description, the application of the principle must so depend upon circumstances, as to leave the question more upon the application than upon the existence; but as far as decided cases furnish any rule, it must be

applied. To proceed then to the first objection: Had the captain a right to sell, so as to bind the insurer on the facts of the case before us? This involves, first, the general right of the captain to sell, and secondly, the peculiar facts as affecting the exercise of such right. The first view taken of the subject, has been as to the right, and the extent of such right, as it may become a question between the captain and his owner, or between the original owners and a purchaser, who may derive title under a sale by the captain. Many cases have been cited upon this part of the subject: the first I shall allude to of this description, were those of the *Betty Catheart* (a), of the *Gratitude* (b), and *Reid v. Darby* (c), and of others that will be mentioned hereafter. It may be necessary, therefore, first to consider the doctrine as affecting such a case, and next to examine how far it is applicable to the present. With respect to the general policy of the rule as to the right of the captain to sell, in my brother *Marshall's* treatise on the Law of Insurance (d), this question will be found to be treated at large, and also, in the *Treatise of the Law relative to Merchant Ships and Seamen*, by the present Lord Chief Justice *Abbott*, and to the cases cited in both I shall generally refer. Several foreign ordinances expressly declare that the master shall not sell without a special authority from the owners; and Sir *Matthew Hale*, in conformity to such regulations, is reported to have decided that the sale of a ship by the master did not convey the property to the buyer, although the sale was made in a foreign country, in a case of inevitable danger, the ship and tackle being beaten and broken, and no hope of saving any part of

1819.

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IDLE

v.

THE ROYAL  
EXCHANGE  
ASSURANCE.

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(a) 1 Rob. Adm. Rep. 220.—(b) 3 Rob. Adm. Rep. 240.  
—(c) 10 East, 143.—(d) 2 vol. tit. *Abandonment*.

1819.  
 ~~~~~  
 IDLE
 v.
 THE ROYAL
 EXCHANGE
 ASSURANCE.

them, partly on account of the tempest, and partly on account of the barbarity of the inhabitants of that country, who carried off every thing that was cast on shore. This case is certainly very strong, and so much so, that it has suggested a doubt of the accuracy of the report; for, in observing upon it, Lord Chief Justice *Abbott* says, "Perhaps there might be in this case some circumstances not noticed by the reporter, that might lead the learned Judge to doubt the absolute necessity of a sale, or to think the buyer a party to the misconduct mentioned in the book." This doctrine seems, however, to have obtained in the subsequent case of *Johnson v. Shippen (a)*, in which Lord *Holt* is reported to have said, "The master has no authority to sell any part of the ship, and his sale transfers no property."—Though, as to this, it is to be remarked, that on looking to the facts of that case, it did not turn on the point of necessity, but on a distinction between hypothecating and selling, for hypothecation would have been sufficient, and for necessary repairs it was admitted that this might be done. In a subsequent case, however, though Lord *Ellenborough* seemed disposed to admit the right of the master to sell in a case of extreme necessity (and the instance which he puts, is of a wreck which cannot be got off), yet his Lordship offered to reserve the question of the master's power to sell under any circumstances, if the verdict should render it necessary. In the case of *Reid v. Darby (b)*, his Lordship also quoted the authority of Lord *Holt* as to the master's having no such right. In the case of *Hayman v. Molton (c)* he again expressed himself in these terms: "Where a case of urgent

(a) 2 Lord Raym. 984.—(b) 10 East, 157.—(c) 5 Esp. 65.

necessity and extraordinary difficulty occur—where a ship has received irremediable injury, I am disposed to go as far as I can to support what has been contended for; namely, that the captain, acting *bonâ fide* and for the benefit of the owners, might sell the ship. This is the disposition of my mind, but I cannot lay it down as positive law." In *Wilson v. Millar (a)*, his Lordship expressed himself to the same effect. It is therefore certainly true, that even the right to sell, as between the captain and the owners, has been deemed of a very questionable nature; although, upon the whole, extracting from the books what seems to be the weight of authority, I conceive that the right to sell must be considered to exist in cases of extreme necessity; a right, however, which in all cases must be strictly watched. Supposing, therefore, this to be a sale made for the benefit of the absent owners, the question is, was it made under circumstances of justifiable necessity. I shall now advert, in addition to the authorities to which I have already referred, to the cases cited to prove the contrary, and of these, the first is that of *Reid v. Darby (b)*, where the question was, whether upon the facts of that case, the master had a right to sell, and the circumstances were these. The master, on an affidavit that the ship had received considerable damage, procured a survey to be made under the authority of the Vice Admiralty Court, and by a decree of that Court, the ship was finally sold: The Court of King's Bench held, that such sale did not divest the right of the original owner: first, because the captain had no right to sell, under the circumstances of the particular case; and, secondly, that the Court of Vice-Admiralty had no jurisdiction or authority to order a sale. The judgment, in

1819.

 IDLE
 v.
 THE ROYAL
 EXCHANGE
 ASSURANCE.

(a) 2 Stark. 3.—(b) 10 East, 143.

1819.

 IDLE
 v.
 THE ROYAL
 EXCHANGE
 ASSURANCE.

that case, could not, therefore, be different; for there was no sufficient evidence of a necessity to sell, except from the proceedings in the Vice-Admiralty Court, which Court was held to have no jurisdiction to inquire into the necessity: it stood upon the fact of a mere sale by the master, and there was no proof of a necessity for such sale, except what the master himself had sworn. But in this case, there is supplied all that was wanting in *Reid v. Darby*; first, the precise degree of peril in which the ship was placed; and next, the finding of a special jury:—not like the Court of Vice-Admiralty, having no jurisdiction, but having jurisdiction, and in the exercise of that jurisdiction, having found the degree of peril to have been such, as to have induced and justified the sale. Another case has been cited (*a*) to prove the right to sell to be at least doubtful, be the circumstances what they may. I have already adverted to it, in this respect, but subject to this question (to be reserved, if necessary), Lord *Ellenborough* thus lays down the true line, as to the degree and measure of necessity: “A sale can only be justified by extreme necessity, and the most pure good faith; that is, if the vessel is in such a state, as it would be probable that the owners themselves, if on the spot, would have acted in the same way as the captain has done, and have sold the ship. I shall, therefore, leave it to the jury to say, whether there existed such a necessity as called upon the captain, acting for the benefit of his owners, to sell the ship; and if there did, whether this was a fair sale, and unmixed with any fraud?” And after specifying the course which he thinks ought to have been pursued, but which was not, his Lordship adds, “if this had been done, and

(*a*) *Hayman v. Molton*, 5 *Esp.* 65.

failed, the necessity of selling would have been more pressing; and I think the captain should have sold." But before I quit this case, I will only further observe, that if the jury had found upon the question so put to them, in the affirmative, or, rather, that the peril induced and justified the necessity, they would have found not only in substance, but in terms, what is found in this special verdict: but finding the sale to be fraudulent, disposed of the doubt; for the selling fraudulently, excluded the necessity to sell, or rendered the sale void.

I have observed thus far on the case before us, as if it were a question between the former owners on a sale by the captain and the vendee, only for the sake of the general doctrine, as I shall have to apply it; and further, that in a case which is stated to be of great consequence to the maritime and insurance law, I may not be thought to have overlooked the decisions referred to at the bar: but, in truth, this is not a case of implied authority from the owner; for the owner himself was personally present, and is found to have concurred in the sale. And this leads me to consider a different point, namely, that this was not a sale by the captain, but by the owner; and it is asked, can the insured have a right to sell for the insurer? To this I answer, first, that it was not the less a sale by the captain, because one of the owners being present on the spot, concurred; and, if it were necessary, it might, as to this, be observed, that ownership in a ship is not like the cases of joint concern or partnership; for one owner cannot bind the rest, so that, substantially, this was a sale by the captain, and so the special verdict finds; but it also further finds, that the owner on the spot was the agent of the absent owners. No question can arise, therefore, upon implied authority, nor upon the effect of the sale as between the former and the actual proprietor; but

1819.

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IDLE

v.

THE ROYAL  
EXCHANGE  
ASSURANCE.



1819.  
  
 IDLE  
 v.  
 THE ROYAL  
 EXCHANGE  
 ASSURANCE.

I should further say, that on the broad ground of a power to act on a sudden emergency, in order to save as much as could be saved from impending ruin, whether it be the owner or the captain, will make no difference, if the circumstances justified the selling; and the sale was honestly and fairly conducted. And now passing from this line of cases, I come to that which constitutes the precise point on the present occasion; viz. a question between the insurer and the assured, which I conceive to stand on principles essentially different. In the case of *Hamilton v. Mendes* (a), the distinction is broadly marked, "Arbitrary notions concerning the change of property by a capture, as between the former owner and a recaptor or vendee, ought never (said Lord Mansfield) to be the rule of decision, as between the insurer and the assured, upon a contract of indemnity, contrary to the real facts of the case." Let us advert, therefore, now to cases of this description. In *Milles v. Fletcher* (b), Lord Mansfield told the jury, "That if they were satisfied the captain had done what was best for the benefit of all concerned, they must find as for a total loss;" which they accordingly did. And in another part of his Lordship's judgment he says, "The captain, when he came to *New York*, had no express order, but he had an implied authority from both sides to do that which was fit and right to be done, as none of them had agents in the place; and whatever was right for him to have done, if it had been his own ship and cargo, the underwriter must answer for the consequences of it, because it is within his contract of indemnity;" and, finally (his Lordship added), "I left it to the jury to determine,

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(a) 2 Burr. 1198. 1 Sir W. Bl. 276. S. C.—(b) 1 Doug. 232.—*Id.* 234.

whether what the captain had done, was for the benefit of the concerned; and if they had found that it was, in words, where would have been the question of law? A distinction in this case has been attempted to be drawn between the meaning of the words, "for the benefit of all concerned," and the words, "with a view to the benefit of all concerned:" but this seems to be a distinction without a difference. The expression, "*acting for the benefit of all concerned,*" means with a view to that benefit, and not what the consequence of the act may prove. As little reason does it appear to me, that there is for another distinction made between insurance on ship and goods, and insurance on freight. It is said, what has been done could not be for the benefit of the insurer on freight, which must be lost by this proceeding; whereas, if nothing had been done, the ship might have earned her freight, and the insurers have been discharged. And in the events which have happened, so it would have been: but the master is to look to the chief general interest, that is, the ship and cargo; and it would be strange to say that he must suffer these to prove a total loss to the assured, or the insurer, because, by abandonment or sale, the insurer upon freight may have the loss as depending upon freight cast upon him. If this be a necessary consequence of a sale justified in all other respects, it justifies it in this also. The freight is, from its very nature, incident to, and dependant upon the fate of the ship, and in this case, as in every other, parties must be taken to have contracted, according to the nature and necessity of the thing. The authority of *Milles v. Fletcher* (a) has been recognised in

1819.

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IDLE

v.

THE ROYAL  
EXCHANGE  
ASSURANCE.

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(a) 1 Doug. 232.

1819.  
 {  
 IDLE  
 v.  
 THE ROYAL  
 EXCHANGE  
 ASSURANCE.

a great number of subsequent cases, and has never, that I am aware of, been in the slightest degree impeached. In *Plantamour v. Staples* (a), this doctrine is adopted by Mr. Justice *Buller*, who states, "The insurers are bound by the act of the captain, when he does what he deems best for the benefit of all concerned;" and it need not be eventually for such benefit, it is sufficient, that exercising an honest judgment, he deems it so at the time. I will now again refer to the terms in which, in *Hayman v. Molton* (b), Lord *Ellenborough* expressed his opinion; and I shall only further mention *Green v. the Royal Exchange Assurance* (c), in which it was held, that the underwriter would be bound upon a sale fairly conducted, and it only went to the jury on the second trial, on the question of fraud; and Lord Chief Justice *Gibbs*, in granting the rule, stated the opinion of the Court to be, that if the captain acted fairly, and with a view to their benefit, the insurers were bound by the sale; and it is to be noted, that case, like the present, was an insurance on freight. This weight of authority is decisive beyond all doubt, unless the present case can be distinguished. It will be necessary, therefore, to advert to the facts of the several cases, and to see whether they are, in this respect, distinguishable in principle from the present; and the distinction is said to be, that in all the former cases the peril had not only attached, but had induced, as its consequence, actual injury: but that here no actual or adequate damage had happened to justify the sale; that it all rested in chance and contingency, which form the very nature of the contract the insurer takes upon himself. Risk, it has been said,

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(a) 1 *Term Rep.* 611.—(b) 5 *Esp.* 65.—(c) 1 *Marsh.* 447.

is the underwriter's daily bread, and that no person has a right to determine that risk for the underwriter, and place himself in his situation. But to this reasoning I cannot subscribe: the underwriter, before the voyage commences, and whilst the ship is in perfect safety, takes his chance of all possible peril; but when the actual peril has taken place, and is impending, and the subject matter of insurance is in the jaws of destruction; the speculation is entirely changed; and when the assured can no longer act for himself in estimating the degree of danger, nor give directions what shall be done, the question is, whether it be not a benefit to him to vest in some person a power to save from probable destruction all that can possibly or probably be saved. Apply this principle to the present case; but first let the facts of the former cases be examined, and without going through the precise detail, it may at once be admitted, that in every former case the peril of the sea had to a certain degree attached, and brought the ship into that state, in which abandonment or sale took place by the assured; but here it is said that the loss arose out of the act of the owner in selling, and that the sale was not induced by any peril of the sea. But this distinction seems to me also to be a fallacy; the state of the ship, which led to the sale, was induced by the perils of the sea: she had incurred damage, in the course of her voyage, which made it necessary to run her on shore, and she was stranded at the time; there was no reason for supposing she would have been got off the rocks, but, on the contrary, every probability of her going to destruction; which of itself authorised the assured to treat the voyage as at an end: so, that though the sale arose immediately out of the act of the captain, yet, that act was induced by a peril which had taken place, and

1819.

W

IDLE

v.

THE ROYAL  
EXCHANGE  
ASSURANCE.

1819.  
 ~~~~~  
 IDLE
 v.
 THE ROYAL
 EXCHANGE
 ASSURANCE.

put the ship into a state in which the verdict finds that, in point of fact, it was proper to sell. The remote and proximate causes are not to be distinguished, in point of effect; in this situation, the interest of the assurer was consulted, and, acting for the best, the ship was sold. The case of *McCarthy v. Abel* (a), has been referred to, and much relied on, for these general words made use of by Lord *Ellenborough*. "If the fact be merely looked at, freight, in the events which have happened, has not been lost, but has been fully and entirely earned and received by or on the behalf of the plaintiffs (the assured);" (but in this case it is the reverse; the freight, in the events which have happened, has been lost to the assured).—His Lordship then proceeded, "But if it can be considered as having been in any other manner lost to the owners of the ship, it has become so lost to them, not by means of the perils insured against, but by means of an abandonment of the ship; which abandonment was the act of the assured themselves, with which, therefore, and the consequences thereof, the underwriters on freight have no concern." And so taken, without reference to the facts of the case, these words may seem to have application; but in truth they have none; for they apply to a case in which the decision goes upon the very ground that the assured had no right to abandon, the ship itself being in safety at the time: and, further, on the fact, that the same cargo in the same ship, belonging to the same owners, did ultimately perform the voyage, so as to have gained freight for the owners; and therefore that they had not a right to abandon, and change a partial into a total loss. In the present case, I may again ob-

(a) 5 *East*, 388.

serve, the ship and cargo were not in safety, but in the greatest peril, and the sale was with a view to the preservation of a part, and therefore for the benefit of the assurer and not the assured, and in result no freight whatever was earned by the former owners of the ship and cargo. Had the ship and cargo here not been in the state of peril found by the special verdict, but continued the property of the same owners, and the same voyage, with delay only, been ultimately performed, the case of *McCarthy v. Abel* (a) would have applied to the present; but, according to the facts to which that decision was confined, it seems to me to have no application whatever.

The next case which has been cited, is that of *Anderson v. Wallis* (b).—The ship there met with very bad weather in the course of her voyage, sustained much damage, and was obliged to bear up for *Cork*, and run into *Kinsale* harbour; when, upon a survey, she was found to be in so bad a state as to render it necessary to undergo a thorough repair, and that the whole of the cargo should be unloaded. The repairs could not be finished so as to enable the ship to leave *Kinsale* in time to reach *Quebec* that season; nor could any other ship be procured to forward the cargo in time, so that the voyage was abandoned, and the captain sailed on another voyage. It was further proved, that if another ship could have been procured, it would not have been possible to prosecute the voyage that season; for, that after the middle of *November*, it is impossible for any ship to enter the river *St. Lawrence*; it being about that time so full of ice, that it is almost certain destruction for a ship to make the attempt.

1819.

 IDLE
 v.
 THE ROYAL
 EXCHANGE
 ASSURANCE.

(a) 5 East, 388.—(b) 2 Maule and Sel. 240.

1819.

 IDLE
 v.
 THE ROYAL
 EXCHANGE
 ASSURANCE.

These were the facts of that case, and the argument at the bar went upon the ground, that as the ship subsisted, and was in safety, and within the management and control of the agent of the assured at the time, she ought to have been repaired; and therefore the assured had no right to abandon. It was said to be a retardation merely, and not a total frustration of the voyage: and was distinguished in this respect from the case of *Manning v. Newnham* (a), where the ship had received irreparable damage, and the cargo could not be otherwise conveyed to its place of destination; and upon these grounds the Court finally held, that this was a mere retardation of the voyage, and that therefore the assured had no right to abandon. I am at a loss to assimilate such a case with the present. When the captain put an end to the voyage, as by his act he endeavoured to do, the ship was lying in harbour, and in perfect safety; here the ship and cargo were out of all control at the moment, beating on the rocks in the open sea, and in danger of going to pieces every moment. The judgment of the Court in the case of *Anderson v. Wallis* (b) went upon the ground, that the captain did not act for the best. But in this case, the jury have found, that he did act for the best; and in circumstances, the two cases stand in direct opposition. In one respect, however, as to what is said by Lord *Ellenborough*, it is a case in point in favour of the present plaintiffs; for at the conclusion of his judgment, his Lordship expresses himself in these terms; "There is not any case which authorizes an abandonment, unless where the loss has been actually a total loss, or in the highest degree probable at

(a) 2 *Marsh.* on Insurance, 585. 2d Edit. S. C. 2 *Camp.* 624. n.—(b) 2 *Maucl.* and *Scd.* 245.

the time of the abandonment." And that this ship was in the highest degree of probable danger, at the time when the voyage was put an end to by the sale, is not only found by the special verdict, but has in terms been distinctly admitted at the bar: the opinion, therefore, of Lord *Ellenborough* in the case of *Anderson v. Wallis*, is with the plaintiffs in this case, where it does apply; but where it has been endeavoured to be applied, it fails in application. On the case of *Reid v. Darby (a)*, I have already observed, and considering the facts of that case, it does not bear on the present. I have now adverted to most of the cases cited at the bar. It is admitted, that none are, in circumstances, precisely similar to the present; but, for the reasons given, I think those cited for the defendants fail in application, and some of them become authorities the other way: so that, in the result, this case must come round to the plain and simple principle to be found in the case of *Milles v. Fletcher (b)*, impeached by none, confirmed by all the subsequent cases, and not in reason to be distinguished from the present. And there is no danger to the assurer from abiding by such a rule. He may refuse to pay; and what is the consequence? His case will be referred to the consideration of a jury, most competent to decide, composed of men both of commercial and nautical knowledge, some of them ship-owners, others insurers; bringing to the investigation, knowledge and experience; forming, therefore, on the whole, a tribunal to which the investigation may be safely committed. Beyond this, I need scarcely add, their judgment will at all times be liable to review, and even to the examination, if neces-

1819.

 IDLE
 v.
 THE ROYAL
 EXCHANGE
 ASSURANCE.

(a) 10 *East*, 143.—(b) 1 *Doug.* 232.

1819.

IDLE

v.

THE ROYAL
EXCHANGE
ASSURANCE.

sary, which this case has undergone. Our opinion, therefore, is, that the assured are entitled to recover, unless, in point of form, an abandonment of freight was necessary. As to this, I shall only say, without meaning to lay down any general rule, we think it was not, in this particular case. *Green v. the Royal Exchange Assurance* (a) is admitted to be in point; and having concurred in that decision, I see no reason to alter my opinion. Confining, however, the judgment of the Court to the facts before us, we do not think it was necessary to abandon. The consequence is, that judgment must be entered for the plaintiffs.

Judgment for the plaintiffs accordingly.

(a) 1 *Marsh.* 447.

BROOKS, assignee of CARBUTT, a bankrupt, v. SOWERBY
and another (a).

Friday,
Feb. 12.

THIS case now came before the Court on a special verdict, which stated, that *Carbutt*, on the 1st of *January*, 1816, being a trader, dealer, and chapman, and a person within the description of the several statutes made and in force concerning bankrupts, on the 1st of *June*, 1816, became indebted to *Henry Butterworth*, *John Brooks*, *Thomas Smith*, and *Thomas Sharples*, in the sum of £100, and upwards; and that being such trader, and so indebted, he, on the 27th of *August* following, committed an act of bankruptcy; and that on the 7th of *October*, in the same year, a commission of bankrupt against him on the petition of *Butterworth*, *Brooks*, *Smith*, and *Sharples*, directed to five commissioners therein named, giving full power and authority to them, four or three of them, of whom one or two certain of the persons mentioned as commissioners was to be one to execute the commission; that by virtue of the commission, three of the commissioners, of whom one of the said two persons in that behalf was one, having taken on themselves the burthen and execution of the commission, afterwards found that *Carbutt* became a bankrupt before the suing forth of the commission; and that they did thereupon declare and adjudge him bankrupt accordingly. And that, on the 26th of *November*, at a meeting of his creditors, in that behalf, duly held, the plaintiff was by such creditors duly chosen sole assignee of *Carbutt's* estate and effects; and that, on the same day, by an indenture made between three of

The issuing a commission of bankruptcy is of itself sufficient notice to all the world of a prior act of bankruptcy having been committed: and the want of actual or personal knowledge of the issuing of such commission will not protect a payment made within the stat. 1 Jac. 1. c. 15. s. 14.

(a) For the previous judgment of the Court in this case, see *ante*, vol. 2, page 58.

1819.
BROOKS
v.
SOWERBY.

the commissioners, of whom one of the two persons in that behalf was one, of the one part, and the plaintiff of the other part, the said three commissioners did order, bargain, sell, assign, transfer, and set over unto the plaintiff all the goods, chattels, personal estate, and effects of *Carbutt*: To have and to hold the same to the plaintiff in trust for the benefit of the creditors. That the defendants, before and at the several times hereinafter mentioned, were co-partners in trade; and that whilst *Carbutt* was such trader, and before his bankruptcy, they were indebted to him in the sum of £95 : 4s. for goods sold and delivered by him to them before he became bankrupt. That on the 10th of *October*, being after the issuing the commission, *Carbutt*, in order to obtain payment of the same debt, in manner hereinafter stated, sent from *Stockton*, in the county of *Durham*, where he then was, a letter directed to one *Henry Thomas*, his agent, at *Manchester*, in which letter he inclosed a paper, stamped with a stamp, for a bill of exchange, in blank, excepting that the name of *Carbutt* was by him written thereunder as the maker, and was also indorsed by him thereon as the indorser; and by that letter he requested the said *Henry Thomas* to deliver the stamp so signed to his (*Carbutt's*) father, and to tell him to date it back, and place it to his own account; that the stamped paper, with *Carbutt's* name thereon, was accordingly, on the 13th of *October*, delivered to his father, *Francis Carbutt*, at *Manchester*, and that the same was, on that day, filled up by some person in the form of a bill of exchange; and that it was dated back to the 4th of *October*, in the same year, and that when it was so filled up, purported to be the bill of *Carbutt*, the bankrupt, directed to the defendants, whereby he requested them, at four months after the date thereof, to pay to the order of himself £95 : 4s. value received, and

to be duly indorsed by him. That the defendants did not see the bill of exchange, nor had they any knowledge thereof until the 30th of *October*, on which day it was presented to them for acceptance, in the ordinary course of business, by a third person, who was then the *bona fide* holder thereof, and was by them duly accepted, in order to discharge the said debt. That the defendants had not, at any time before their acceptance of the bill, any notice that *Carbutt* had become a bankrupt, or that he was insolvent, or had stopped payment, unless the issuing of the commission be by law deemed sufficient notice thereof. That the notice of the commission and bankruptcy appeared in the *London Gazette*, for the first time, on the 5th of *November*; and that after the appearance of that notice, and after the assignment by the commissioners to the plaintiff before the bill of exchange became payable, namely, on the 14th of *January*, 1817, the plaintiff, as assignee of *Carbutt*, demanded from the defendants payment of the said sum of £95 : 4s. but which they did not then, nor have since, paid to him. That when the bill of exchange became payable, viz. on the 7th of *February*, 1817, the defendants paid the said sum of £95 : 4s. therein specified, to a third person, who was then the *bona fide* holder thereof; and that that sum, so due from the defendants to *Carbutt*, at the time of his bankruptcy, was not paid by them, or satisfied in any other manner than as above-mentioned.

The question for the opinion of the Court, was, whether the defendants were discharged, by the payment of the bill, from their liability to the plaintiff, as assignee.

This case was twice argued; first, in the last term by Mr. Serjt. *Lens*, for the plaintiff, and Mr. Serjt. *Blosset*, for the defendants; and again, in this term, by Mr.

1819.
 {
 Brooks
 v.
 SOWERBY.

1819.
 {
 BROOKS
 v.
 SOWERBY.

Serjt. *Vaughan*, for the plaintiff, and Mr. Serjt. *Copley*, for the defendants.

Arguments for the plaintiff.—The questions to be considered are, whether the issuing of the commission can be deemed notice to all the world of a prior act of bankruptcy having been committed? or whether an actual or personal knowledge of the issuing of such commission is required, to bring this case within the statute 1 *Jac.* 1. c. 15. s. 14. The first point to be ascertained, is, the effect of the act of bankruptcy, when followed up by a commission and assignment. The moment a person becomes bankrupt he ceases to have any authority to draw a bill, or to control the disposition of any of his funds. The 13 *Eliz.* c. 7. s. 2. gives an authority to the commissioners to dispose of the bankrupt's money, goods, chattels, merchandise, and debts, where-soever they may be found or known, and to cause the same to be sold for the best value they may; or, otherwise, to order the same for true satisfaction and payment of the creditors: and that every direction, order, bargain, sale, and other things done by the commissioners shall be good and effectual in the law, to all intents, constructions, and purposes, against the offender, debtor, his wife, heir, or child, and against all other person, or persons, claiming by, from, or under, such offender or debtor, by any act or acts, made or done after any such person shall become bankrupt. The effect of this clause therefore, is, to make a bankrupt *civiliter mortuus*; for he has no power over his effects, and by the operation of law is divested of all his property from the moment the act of bankruptcy is committed, when such act has been followed up by a commission and assignment, and when the one has issued

and the other is made, from that time all the intermediate acts of the bankrupt are void. This, therefore, by relation, vests the rights of the bankrupt in the assignees; whatever rights, therefore, the bankrupt may afterwards be entitled to, must be acquired by subsequent statutes. It is contended for the defendants, that if a payment be made to a bankrupt, *bonâ fide*, that such payment shall not be endangered, provided the person who pays has no knowledge or understanding that an act of bankruptcy has been committed; that will depend on the construction of the 14th sect. of the stat. 1 Jac. 1. c. 15. It has been determined that a bankrupt cannot draw bills of exchange after an act of bankruptcy; and in the case of *Thomason v. Frere (a)*, where there were three partners, and two of them affected, without authority, to bind the firm by deed, and assigned a debt due to them from a correspondent abroad, without his privity, to a creditor at home, and afterwards by direction of such correspondent, drew a bill of exchange in the name of the firm upon his agent here, which was accepted, payable to their own order for the amount of the debt; and the two partners, in the mean time, having committed acts of bankruptcy, indorsed such bill to the creditor of the firm, in part satisfaction of his debt, and afterwards separate commissions were sued out against the two partners, who were declared bankrupts, and their effects assigned, and the other partner was all this time abroad; in a joint action commenced by the solvent partner and the assignees of the bankrupts against the creditor receiving the bill, it was held that the bankruptcy of the two operated as a dissolution of the partnership, and destroyed every act of trading; and Mr. Justice *Le Blanc* there said (*b*),

1819.
BROOKS
v.
SOWERBY.

(a) 10 *Earl*, 418.—(b) *Id.* 425.

1819.
 {
 BROOKS
 v.
 SOWERBY.

"After the acts of bankruptcy committed by two of the partners, followed up as they were by commissions and assignments, they ceased to have any control or disposition over the joint property; and therefore their indorsement of the bill to the defendants, after such acts of bankruptcy, was made by persons having no authority to dispose, in that manner, of the partnership fund or property; and the present plaintiffs, in whom by operation of law the whole property was vested, from that time are entitled to recover back the money received on the bill as money received to the use of the other partner, and of the respective assignees." Although the bill there was paid, *bonâ fide*, to satisfy the debt, yet as it was drawn by a person having no control over the property, it was, therefore, held to be paid under an authority which failed. It is quite clear that an acceptance of a bill of exchange is equivalent to a payment (a); but the acceptance here pre-supposes the right in the bankrupt to indorse; had he then any right to give an authority to call on the defendants to pay the bill by virtue of this indorsement? If the bill had been drawn in the ordinary course of trade, it might have been protected by the statute of *James*, but it was drawn and indorsed by a person who, at the time, had lost the capacity of doing either; and it was, therefore, an authority to pay money by a person who, under the statute of *Eliz.* had lost all power to do so, which power was not revived by the subsequent statute of *James*. As to the general effects of the operation of bankruptcy, it has been determined in the case of *Hague v. Rolleston* (b), that a separate commission against one partner followed by an adjudication that he is a bankrupt, puts

(a) *Wilkins v. Casey*, 7 Term Rep. 711.—(b) 4 Burr. 2174.

an end to the partnership; that the effect of the bankruptcy is to dissolve the partnership, and to avoid all the acts of the bankrupt from the day of the bankruptcy: and in *Marsh v. Chambers* (a), it was held, that if a bill of exchange be indorsed to the debtor of a bankrupt after the bankruptcy, it cannot be set off against a demand by the assignees; so, in *Dickson v. Evans* (b), it was held, that in an action brought by the assignees of a bankrupt upon a promissory note, payable to the bankrupt, the defendant cannot set off cash notes issued by the bankrupt, payable to the bearer, bearing date before his bankruptcy, unless the defendant shew that such notes came to his hands before the bankruptcy took place; for, if the notes were indorsed by the bankrupt after the bankruptcy, they could pass no interest, for his power was gone. With respect to the question, whether the commission is to be taken as notice or not, it will depend not only on the construction of a series of statutes passed on that subject, but on the authority of decisions previous as well as subsequent to their enactment; and those statutes affirm the law as it was before. The issuing a commission has ever been considered to be taken as a notice to all the world of an act of bankruptcy having taken place. The 46th and 49th Geo. 3. go further, and make a superseded commission notice. No distinction has been drawn between an express and implied notice of an act of bankruptcy having taken place; for the defendants, it is contended that this case comes within the meaning of the statute 1 Jac. 1. c. 15. s. 14. which protects the payment made by them. It is material to observe how the law stood previous to the time that statute was passed; for the

1819.
 ~~~~~  
 BROOKS  
 v.  
 SOWERBY.

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(a) 2 Str. 1234.—(b) 6 Term Rep. 57.




1819.  
BROOKS  
v.  
SOWERBY.

very intention of that statute was to give a benefit: it was found that great inconvenience had been sustained by secret acts of bankruptcy; and, therefore, that when money was paid to a bankrupt, *bonâ fide*, and in the regular course of payment, it was thought unjust that a party should be called on to pay it over again, upon the doctrine of its being the property of the assignees, by relation of the act of bankruptcy. In *Smith v. Mills (a)*, there is a distinct authority, to shew that a commission of bankruptcy is notice, for it was there resolved by all the Judges, as follows: "Also this case is stronger, because the gift is an assignment of the bankrupt after the commission awarded under the great seal; which commission is matter of record, whereof every one may take conusance." The only distinction between a record and a commission of bankrupt, is, that the former was not actually published, but, by being on record, every person was bound to take notice of them. This resolution was made 18 years after the passing of the stat. 13 *Eliz.* c. 7. and the word "*may*" is to be construed imperatively, and taken to mean "*must*;" and after that resolution it is stated that "*vigilantibus et non dormientibus jura subveniunt*;" for otherwise a debt might be concealed, or a creditor might absent himself, and so avoid all the proceedings of the commissioners by force of the said act; and every creditor may take notice of the commission being matter of record, as is aforesaid, and so no inconvenience can happen to any creditor who will be vigilant; but great inconvenience will follow, and the whole effect of the act be overthrown, if other construction should be made." There is no difference as to whether this be a constructive or implied notice. Since the

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(a) 2 *Rep.* 26.

1819.  
  
 BROOKS  
 v.  
 SOWERBY.

statute of *James* has passed, it has been held (*a*), that the issuing a commission is a public act, of which, when it is sued out, all are bound to take notice; and the Court there said, that all the property was divested by the act of parliament, to which all persons were presumed to be parties, and bound by it; so in *Collett v. De Gols* (*b*), it was held, that a commission of bankrupt was a public act, but that an act of bankruptcy might be so secret as to be impossible to be known; and the distinction was then taken between the actual issuing of the commission and the act of bankruptcy itself. When a statute directs notice to be given, it means, that all the world are conclusively bound to know the fact. In *Watkins v. Maund* (*c*), Lord *Ellenborough* said, "I must consider that a commission of bankrupt has *issued*, when it is delivered out under the great seal, and that that would be sufficient to bring it within the meaning of the 49 *Geo. 3. c. 121.* although such a commission had never been opened or acted upon. Notice, then, is equivalent to knowledge, and no distinction can be drawn between express and implied knowledge. Personal ignorance of a commission having issued is, therefore, no excuse. The statute 1 *Jac. 1.* was a boon given in case of the rigor of the law as it then stood; it therefore remains to be considered how far the advantage of that statute is taken away by the effect of subsequent statutes, with respect to payments made by, as well as those to, a bankrupt. Payments made by a bankrupt were not protected until the 5 *Geo. 2. c. 30*; and the statute of *James* relates only to payments made to a bankrupt. The 19 *Geo. 2.*

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(*a*) *Hitchcox v. Sedgwick*, 2 *Vern.* 161.—(*b*) *Cas. Temp. Talb. by Forrester*, 70.—(*c*) 3 *Camp.* 309.

1819.  
 {  
 BROOKS  
 v.  
 SOWERBY.

c. 32. s. 1. (a), is conclusive, to shew, that if the construction contended for ought to prevail, it should do so as well in payments made to, as by, a bankrupt. On the construction of this clause, the instant the commission issued, although it was impossible for the party to have any knowledge of its having so issued by any individual information, yet if a payment were made without such notice, it would not avail. If a commission had issued it is not to be considered as a secret act of bankruptcy, if it comes to the knowledge of a creditor, and a commission is sued out. The 5 Geo. 2. and the 19 Geo. 2. therefore, taken with reference to each other, are applicable to the present question; but by the 46 Geo. 3. c. 135. and the 49 Geo. 3. c. 121. the parliament has recognised as the existing law, that a commission, though superseded, shall be notice. The former established two things: first, it rendered good all payments, *bond fide* made two months before the commission, provided the persons dealing with the bankrupt had not, at the time of such payment, any notice of any prior act of bankruptcy, or that the bankrupt was insolvent, or had stopped payment; it therefore did not contemplate a

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(a) By which it is enacted, "That no person who is, or shall be *bond fide* a creditor of any bankrupt, for or in respect of goods really and *bond fide* sold to such bankrupt, or for or in respect of any bills of exchange, *bond fide* drawn, negotiated, or accepted by such bankrupt, in the usual and ordinary course of trade and dealing, shall be liable to refund or repay to the assignees of such bankrupt's estate, any money, which, before the suing forth of such commission, was really and *bond fide*, and in the usual and ordinary course of trade and dealing, received by such person of any such bankrupt, before such time as the person receiving the same shall know, understand, or have notice that he is become a bankrupt, or that he is in insolvent circumstances."

commission acted upon, but a former commission which no longer existed; and yet it directed that a commission, though superseded, should be deemed notice of a prior act of bankruptcy having been committed. The effect of a *supersedeas*, is as if there had been no commission issued, and by it all intermediate acts are avoided; and therefore it was necessary for the legislature to express that even this superseded commission should operate as a notice. By this statute it was declared, that the striking a docket should be notice of a prior act of bankruptcy having been committed. The striking of a docket is merely a private act, and the commission does not issue until after such docket is strack; the 49 *Geo.* 3. c. 21. s. 1. therefore repeals so much of the provision of the 46th as declared the striking of a docket to be notice; but it still left a superseded commission as sufficient evidence of the species of insolvency which was to take the case out of the statute, and directed that such commission should be deemed as notice to the party; as far as the statutes are to be considered, therefore, in this case, from the 19 *Geo.* 2. to the 49 *Geo.* 3. it must be taken as law, that the commission is matter of notoriety, of which all the world are bound to take notice. It may be contended, that a commission cannot be notice till published in the *Gazette*; but the *Gazette* forms no part of the commission, and it would be equally valid without. The publication in the *Gazette* was first introduced by the 5 *Geo.* 2. c. 30. s. 26. and was merely intended as a notice of meeting to be given to the creditors, that they might come in and prove their debts under the commission, and for the choice of assignees and surrender of the bankrupt. General rules must have their operation: it is better that private individuals should sustain mischief than that the public should endure inconvenience; it is, therefore, no answer for the

1819.  
  
 BROOKS  
 v.  
 SOWERBY.

1819.  
 BROOKS  
 v.  
 SOWERBY.

defendants here to say, that it was impossible for them to ascertain whether the commission had issued or not. If the payment be made before the commission issues, it will be protected; and, if after, it will not. If the payment be made by a bankrupt, and the creditor has no knowledge of his insolvency, such payment cannot be protected, if the commission has previously issued. The defendants, therefore, have made this payment in their own wrong, and as by the true construction of all the statutes which have passed on this subject, and of all the previous and subsequent decisions, commissions of bankruptcy have always been treated as matter of notoriety; and though this case may not come within the statutes of 46 and 49 *Geo. 3.* yet this payment is not protected by that of *James 1.* and the plaintiff, therefore, is entitled to recover.

For the defendants, it was submitted, that this payment was protected by 1 *Jac. 1. c. 15. s. 14.* under which no constructive notice was contemplated, but that express notice was absolutely necessary to bring a debtor within that clause. In no case where knowledge and understanding of a fact is required to be brought home to the party, is a constructive notice in contemplation of law sufficient. This case is not varied by the 46 and 49 of *Geo. 3.* as those statutes were merely calculated to protect the fair trader: if, therefore, this would have been a good payment before these statutes had passed, it must remain so now. If the propositions contended for be established, it will be impossible for any person, however distant his residence may be from *London*, to accept a bill of exchange without doing so at the hazard of a commission of bankruptcy having been previously taken out; and, in such a case, at the risk of being obliged to pay a second time. This is a payment which stands in a different situa-

tion to payments to bankrupts generally, as it was not voluntary, for the defendants were bound to pay the amount of the bill in question to a *bonâ fide* holder. The legislature intended to protect payments made to bankrupts *bonâ fide*, if the party paying did not know of an act of bankruptcy; for this purpose an actual, and not an implied, knowledge, was necessary: can, therefore, an implied or imaginary notice of a commission overthrow a *bonâ fide* dealing between the parties? The case of *Thomason v. Frere* (a) is inapplicable to the present question, as that case did not turn on the drawing of a bill of exchange, but on the circumstance of a partnership having been dissolved, and two co-partners taking on themselves to dispose of the joint property, and upon that ground only was the judgment of Mr. Justice *Le Blanc* founded. It has been said, that the statute of *James* was introduced to mitigate the rigor of the law; but it is there enacted by the 13th section, that after the debts due to the bankrupt have been assigned to the commissioners, they shall not be recoverable by him; and in the subsequent section it is provided, that no debtor of the bankrupt should be thereby endangered, from the payment of a debt *bonâ fide* made to such bankrupt:—the whole statute must be taken together, as rendering effectual the assignment of debts by the bankrupt to the commissioners, and, at the same time, providing that the assignees shall have authority to sue for them, taking care that a *bonâ fide* payment to the bankrupt shall not injure the creditor, where he does not understand and know that he has become a bankrupt, or committed an act of bankruptcy; the words of the proviso in the 14th section, therefore, must be taken in their ordinary acceptance. The previous section in-

1819.  
 BROOKS  
 v.  
 SOWERBY.

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(a) 10 *East*, 418.

1819.  
BROOKS  
v.  
SOWERBY.

tended to provide for all the debts due to the bankrupt, but by the latter a *bonâ fide* debtor was to be protected: that clause would be rendered nugatory if any thing short of actual knowledge were held sufficient to deprive the party of the benefit to be derived from it; the words "understand," or "know," therefore, cannot be referred to what may be deemed a legal notice. Commissions of bankruptcy are sealed without the privacy of any one but the immediate parties who apply for them, and a considerable time may elapse before any debtors or creditors of the bankrupt have the least knowledge of their being issued. A payment may be made, which is contemporaneous with, or immediately after, the sealing of the commission. It would be the greatest injustice to say, that the party making such payment should be considered as understanding and knowing that his creditor had become bankrupt. The statute of *James* is a remedial law, and must receive a liberal construction; for Lord *Kenyon* so expressed himself in the strongest terms in the case of *Wilkins v. Casey*, where a payment was made after an act of bankruptcy: and his Lordship there says (a), that "The object of the statute was to protect certain payments made to a bankrupt, which common sense and justice required should be deemed valid payments, and in this instance to correct the rigor of the bankrupt laws;" can it, therefore, be a remedial construction of the statute to say, that the mere issuing a commission shall be equivalent to notice, or that any thing short of actual knowledge will suffice? It has been contended, that a commission of bankruptcy is a matter of record, of which every one is bound to take notice; but no distinction has been drawn whether it be a record of a commission of bankrupt, which is of the most private

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(a) 7 Term Rep. 713.

description, or a record of the most public nature. It is clear that the parties who have not notice of a record are not bound by it; therefore to say that all parties are bound to take notice of a record is an untenable proposition. The case of *Smith v. Mills*(a) has been cited from *Cate* in its support, which was decided before the statute of *James* passed; and therefore the bankrupt laws afforded no relief to the debtor or creditor in their transactions with the bankrupt. It stood on the naked principle which at present governs, that every thing that was done after the bankruptcy was void: it was not a payment made to a bankrupt, but a gift of goods by him to a creditor, after a commission had been sued out. There was no question in that case of the commission being issued; whether it had been issued or not, still the conveyance having been made after the bankruptcy, the gift was void, and, therefore, what was there said of the effect of the commission was extra-judicial; for the Court relied on the 13 *Eliz.* c. 7, and rested its judgment solely on the gift being after the commission. The bankrupt had nothing to assign; all his property having passed from him by operation of the act of bankruptcy, and the issuing the commission made no difference; therefore the resolution of the Judges, as to the present question, may be considered as containing mere *obiter dicta*, or, at all events, the terms of that case are carried beyond what it will warrant. It is impossible to contend, that because every one is bound to take notice of a statute, that therefore every thing done in pursuance of that statute must be binding, and that all the world are obliged to take notice of what is so done: even if this were so, it does not follow that all are bound to take notice of a commission of bankruptcy springing from the common law, although they are

1819.  
 BROOKS  
 v.  
 SOWERBY.

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(a) 2 *Rep.* 26.



1819.  
 {  
 BROOKS  
 v.  
 SOWERBY.

bound to take notice of the common law itself. *Hitchcox v. Sedgwick* (a) was precisely similar in terms to that in *Coke*, and was decided after the statute 1 Jac. 1. had passed, and was not a payment to the bankrupt, but an assignment of his estate by him, and did not turn on the issuing the commission. All those two cases decided, was, that by the commission and assignment the property vested in the assignees, and in the latter, it means nothing more than that the property is transferred by the commission, which is matter of record, and the question there was, whether the property vested in the purchaser or the assignees? The conveyance was there made after the commission and assignment; and the Court held that all the estate had gone out of the bankrupt, by the act of bankruptcy, and that when the commission was sued out, the party was bound to take notice of it: nothing more was decided by that case, than that the property being bound by the record, was to be governed by the transfer to the commissioners; that case, therefore, is not applicable to the present, as the property cannot be governed by a commission; unless the party actually understands and knows that the person to whom he pays his debt has become a bankrupt, or is insolvent. The same observation applies to *Collett v. De Gols* (b): that was a conveyance by the bankrupt, which was set aside, on the ground that it was void, having been made after the statute of *Elix.* had passed, and was, therefore, not protected by that act. In all those cases the assignment took place after the act of bankruptcy; whether the commission were issued or not made no difference; neither did it matter whether the party knew of the commission, or not. In *Watkins v.*

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(a) 2 Vern. 156.—(b) *Cas. Temp. Talb. by Forrester*, 65.

*Mand (a)*, two months had elapsed between the time the payment was made and the date of the commission, so as to be protected by the 46 Geo. 3. c. 135. s. 1.; that, therefore, is not applicable to the present question. [Mr. Justice *Burrough*. In the case of *Paine v. Teap (b)*, a person became bankrupt, and was afterwards outlawed; the King made a lease of the profits of his lands, and also a grant of his chattels; afterwards a commission of bankruptcy was taken out, and the question was, whether, and how far, this outlawry, lease, and grant, should prejudice the creditors of the bankrupt? And it was there resolved, that the creditors were not hurt by the outlawry, for that was his own act; and the assignee of the King's lease having paid for it, was a purchaser within the statute 21 Jac. 1. c. 19. and not to be impeached by the commission sued out five years after the bankruptcy.] That case was determined on the 21 Jac. 1. and is, therefore, irrelevant to the present; but the defendants here, claim to be protected in the payment they have made, by 1 Jac. 1. c. 15. s. 14. The general proposition as to outlawry, in that case, was, that it being a voluntary act, was void. The 1st of *James* 1. protected payments to a bankrupt; and the 21st purchases, and protection was afforded to these by the latter statute only. Many cases have been decided with respect to the registry of deeds, which is a record in many instances; and by the registry it is notified to all the world, that such a deed has been registered; but it has been held that the registry is not sufficient, on the ground that the law is not satisfied with presumptive, where express notice is required. In *Bushell v. Bushell (c)*, it was held, that the registry of deeds under the 6 *Anne*, c. 2.

1819.  
BROOKS  
v.  
SOWERBY.

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(a) 3 *Camp*. 308.—(b) 1 *Salk*. 108.—(c) 1 *Sch.* and *Lef*. 90.

1819.  
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 BROOKS
 v.
 SOWERBY.

was not notice; and Lord *Redesdale* there said, that "It is true the registry is considered as notice to a certain extent: no person thinks of purchasing an estate without searching it, and if he searches he has notice;" but his Lordship thought that it could not be considered as notice to all intents and purposes, on account of the mischief that might arise from such decision: so, in *Underwood v. Courtown* (a), it was held, that the registering of the deed under that statute, was not notice within the meaning of the word, as applied by Courts of Equity, so as to make every subsequent purchaser a purchaser with notice. A constructive notice, therefore, is extremely mischievous in principle; and more particularly so, that a commission of bankrupt, which asserts no fact, shall, by its issuing, operate as a constructive notice on a *bonâ fide* transaction between man and man.

The statute 19 *Geo. 2.* rather tends to operate in favour of the defendants, with respect to the construction of the previous acts; for the great distinction is as to payments made by and to a bankrupt. Where a payment is made by a bankrupt it shall not be protected, unless it be made before the suing out the commission, or the party has notice that he is a bankrupt, or is in insolvent circumstances; whether, therefore, there was actual notice or not, the legislature have expressly stated that the commission should be operative. Where a payment is made by a bankrupt after a commission has issued, it is void, and the creditor is obliged to repay it; he is only placed in his original situation, and comes in, as he would have done, under the commission; but where a payment is made to a bankrupt by a debtor, is he, after having *bonâ fide* paid it, again liable to be called upon

(a) 2 *Sch. and Lef.* 64—5.

1819.
 ~~~~~  
 BROOKS  
 v.  
 SOWBERRY.

by, and repay it to, the assignees? With respect to the 46 and 49 Geo. 3. they are not applicable to this case; it is clear that the notice does not extend further than the cases named in those statutes; for they are expressly stated to apply only to the purposes for which those acts were passed. It cannot be inferred that the words "understand and know," in the stat. 1 Jac. 1. can mean any thing less than actual knowledge to be necessary. The argument to be deduced from the language of those latter statutes, as applicable to the present case, is this; that with respect to making a commission notice, though superseded, it follows, that the commission, without the appendage of those latter words, was notice, before those statutes were passed: at all events, these words are equivocal, and may be liable to another construction; but the notices introduced there were only for the purposes of the acts; they therefore give particular benefits to persons who deal with bankrupts, and direct that they shall have them where they have no notice of the situation of the bankrupt, appointing that a commission, though superseded, shall be notice within those acts, thereby qualifying and mitigating the rigour of the law. Before those acts passed payments were only protected, where they were in discharge of debts; should the construction contended for by the plaintiffs be put upon those statutes, so far from mitigating, it would be a repeal, of the law. Can it be supposed, that before those statutes were passed, that a commission, sued out at any distance of time behind the back of a party, should be deemed notice of a prior act of bankruptcy? But those latter statutes go further, and make a superseded commission notice, which was never considered to be so before. As, therefore, the payment was made by the defendants *bond fide*, and without their knowledge of the act of bankruptcy, such payment is protected by the 14th section of the 1 Jac. 1.

1819.  
BROOKS  
v.  
SOWERBY.

in which actual knowledge is considered necessary; and therefore a constructive or legal knowledge cannot deprive the defendants of those benefits to which they are entitled by that clause.

In reply.—It was admitted, that this case depended entirely on the construction of the 14th sect. of 1 Jac. 1. c. 15; but that that statute must be considered with reference to all the other statutes relative to bankrupts, which have passed previously and subsequently to it. The power of assigning the debts of the bankrupt was given by the statute of the 13 Eliz.; and by the 13th section of 1 Jac. 1. c. 15. a further power is given to the commissioners, as to the debts due to the bankrupt; but as to its general provisions, the law stands in the same situation in which it was by the statute of *Elizabeth*. The commission is directed to persons who are to take notice of the change of property, and who are to deal with it; but it makes no change in the property itself, nor is it bound thereby. So a superseded commission means, that persons are to take notice of it as a proceeding to adjudicate: it is a public promulgation that the bankrupt is subject to the bankrupt laws. Every commission is founded on a supposed act of bankruptcy. The principle laid down in *Thomason v. Frere* (a) applies directly to this case, namely, that a person having become a bankrupt, cannot draw a bill of exchange; and that the party in whose favour it is drawn cannot derive any fruits from it; for it is an act done by a person who has lost all his authority and power to draw bills, and is therefore nugatory. The 19th Geo. 2. relates only to *bond fide* creditors, in cases where a bill has been drawn and indorsed previously to an act of bankruptcy,

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(a) 10 East, 418.

and paid afterwards, when it enacts that the proceeds of such bill shall not be refunded, provided the party had no knowledge of the insolvency. By the 5 *Geo. 2. c. 30. ss. 1. and 26*, the *Gazette* was made notice for the several express purposes therein contained. The 1st section of that statute is in the nature of a proclamation, requiring the bankrupt to surrender. It has been said that payments by, are distinguishable from those made to a bankrupt, as the party who receives a payment from, is not placed in so bad a situation as he who makes one to, a bankrupt: it is true, the latter has the option of coming in under the commission and taking a dividend; but the legislature intended to put all persons on the same footing with respect to secret acts of bankruptcy. The statute 46 *Geo. 3.* was passed to extend payments made by or to a bankrupt, to all dealings and transactions with him, and enacted that if they were made without knowledge of the bankruptcy, that they should be considered as binding and conclusive, provided two months had elapsed without a commission having issued. By that and the subsequent statute of the 49 *Geo. 3.* a commission, though superseded, is to be deemed notice; can, therefore, a commission, not superseded, be said not to be so? It has further been laid down as a position, that no presumptive notice is sufficient to bring this case within the 14th section of 1 *Jac. 1. c. 15.*; but it does not appear so by that section, neither has any case been cited, where it has been determined that the issuing a commission is not in itself a general notice, but only notice to those who have express knowledge of its having issued. The words of that statute are, "Unless he shall understand and know that the party has become a bankrupt;" it is, therefore, silent, as to whether a notice given by law be, or be not, equivalent to an actual notice, and there is not a *dictum* to be found to warrant such a supposition

1819.  
 BROOKS  
 v.  
 SOWERBY.

1819.  
 ~~~~~  
 BROOKS
 v.
 SOWERBY.

as is here contended for. It has been said that the cases cited for the plaintiff must be considered as mere *obiter dicta*; but they have been determined solemnly and judicially, and no case has been found to contradict them. But, from all the authorities it appears, that the commission under the Great Seal has ever been considered as notice of an act of bankruptcy having been committed; although it is further contended, that nothing but proving that the party had actual notice of an act of bankruptcy under the statute of *James* should protect him from it. But the words, "*Understand or know*," cannot mean that the act of bankruptcy must be *ipso facto* communicated in terms; for that statute makes no such distinction. Although the cases of *Smith v. Mills* (a), and *Collett v. De Gols* (b), may not be applicable as solemn judgments to the present case, they still contain the acknowledged principles, that a commission must be considered as notice to all the world; it is not, therefore, to be inferred that individual or personal notice must be served on the debtor or creditor of the bankrupt. The case of *Wilkins v. Casey* (c) merely decided, that an acceptance of a bill of exchange was equal to a payment, and in its general principle decides nothing further. The statutes of the 46 and 49 *Geo. 3.* proceeded on a correct knowledge of the law of a commission being considered notice of an act of bankruptcy having before been committed, and directed, that in future, though it might be superseded, it should still be deemed so; but, by those enactments, it is quite clear that the commission, if not superseded, must be, as it ever has been, deemed notice. If the doctrine contended for by the defendants be allowed, it will be necessary that

(a) 2 *Rep.* 26.—(b) *Cas. Temp. Talb.* by Forrester, 65.
 —(c) 7 *Term Rep.* 711.

an act of bankruptcy must not only have been actually committed, but that such act must have been personally known to the parties who were interested in the effects of the bankrupt; but all that is requisite is the issuing of the commission, which deprives the bankrupt of all the power he might have, as to any future property. Notice in the *Gazette* has ever been considered sufficient, and proclamations of war made therein are deemed notice to all the world. The distinction between an act of bankruptcy and the issuing a commission is well drawn in the case of *Collett v. De Gols* (a). In *Watkins v. Maund* (b) it was determined that a commission was entire and perfect the moment it passed under the Great Seal.—With respect to the registry of deeds, the registry is notice; but even there it has never been required that individual or personal notice should be given. The statutes, from the 13 *Eliz.* to the 49 *Geo. 3.* are in *pari materia*, as to a commission being of itself a sufficient notice; and all the decisions, from the case of *Smith v. Mills* (c) to that of *Watkins v. Maund*, have so considered it. No determination has been found to the contrary; and the plaintiff, therefore, is entitled to recover.

1819.
BROOKS
v.
SOWERBY.

Cur. adv. vult.

On this day Lord Chief Justice DALLAS delivered the judgment of the Court as follows:

This case comes before the Court on a special verdict. It was an action by the plaintiff, as assignee of the estate and effects of *John Carbutt*, a bankrupt, to recover a sum of money, claimed to be due to the bankrupt's estate,

(a) *Cas. Temp. Talb.* by *Forrester*, 65.—(b) 3 *Camp.* 308.
—(c) 2 *Rep.* 26.

1819.
BROOKS
v.
SOWERBY.

under the following circumstances.—The defendant had become indebted to the bankrupt to the amount of the sum sought to be recovered by this action, and continued so at the time when he committed an act of bankruptcy, namely, on the 27th *August*, 1816, and on the 7th *October* following, founded on such act of bankruptcy, a commission issued. After the issuing of the commission, that is, on the 10th *October*, the bankrupt drew a bill on the defendants, which they accepted and paid when due, and the special verdict finds, that they had not, at the time of acceptance and payment of the bill, any notice of the bankruptcy, unless the issuing of the commission is, in point of law, to be deemed notice.—On the part of the defendants it is insisted, that a payment *bonâ fide* made, and without actual knowledge of a commission having issued, is protected by the 14th section of 1 *Jac.* 1. c. 15. in which there is this proviso: “Provided always, that no debtor of the bankrupt be hereby endangered for the payment of his or her debt, truly and *bonâ fide*, to any such bankrupt, before such time as he shall understand or know that he is become a bankrupt.” And the question is, whether these words, “understand or know,” mean actual knowledge and understanding, as distinguished from legal and constructive notice. The clause which precedes this proviso relates to conveyances or payments made *by* bankrupts; as to which, it enacts, that the commissioners shall have power to grant and assign the debts due to the bankrupt, to the use of the creditors of the bankrupt; and that after such grant, assignment, or disposition, neither the bankrupt, nor any person, shall have power to recover the same, nor make any release or discharge thereof; “Provided always, that no debtor of the bankrupt be endangered for the payment of his or her debt, truly and *bonâ fide*, to any such bankrupt, before such

time as he shall understand or know that he is become a bankrupt."—First, then, what is meant by the words, "become a bankrupt?" A party becomes a bankrupt by the act of bankruptcy, and not by the commission, by which, founded on the act of bankruptcy, he is only found or declared to be a bankrupt. Now, as this act, from its very nature, will most frequently be secret, it seemed reasonable not to compel a party to pay a second time, who had paid without knowledge, or means of knowledge of such act. The words of the proviso, therefore, are not, "before he shall understand or know that the party is become bankrupt," or "before he shall understand or know that any commission shall have issued;" but omitting the words, "before any commission shall have issued," it refers the want of understanding and knowledge to the party becoming bankrupt; that is, to the act by which he so becomes bankrupt. It is a provision, therefore, that specifically refers to the act of bankruptcy; and in the sense and reason of the thing there is a manifest distinction. By the issuing of the commission, an act, which was before secret in its nature, is proclaimed to the world, and the debtor at least may have knowledge by inquiry; whereas no inquiry, probably, would have led to knowledge, while the act of bankruptcy continued secret. But it is said, he may be just as ignorant of a commission having issued as of the act of bankruptcy, and so he may; and if nothing will do but actual knowledge at the moment of payment, ignorance will be a protection, notwithstanding the words of the statute. And this brings it to the question, whether the commission be or not, in point of law, notice? That it is not so to be considered, rests on the part of the defendants, on general reasoning only; and we have been referred to no one case in which any such doctrine is to be found; while on the part of the plaintiff, there is express

1819.
 BROOKS
 v.
 SOWERBY.

1819.
BROOKS
v.
SOWERBY.

authority the other way. In the case of bankrupts (a) it was resolved by Lord Chief Justice *Wray*, and the whole Court, that a commission of bankruptcy is matter of record, of which every one *may* take notice; and without referring to the many cases in which the word *may* is to be construed *must*, which will depend on the nature of the particular case, it is sufficient to say, that in this case it appears that it must be so understood; for nothing turned upon actual knowledge as distinguished from notice by the commission, and the commission being taken to be notice, the judgment proceeded on this ground. The having it in his power, to take notice, and the commission giving this power, is treated as equivalent to actual notice; and if so, ignorance cannot be averred, of that which, in point of law, a party is bound to know. It is true this was a payment *by* the bankrupt after the commission; but the reasoning, as to notice, applies in principle, to one case as well as the other. This was resolved in 31 *Eliz.*, and in 1 *James* 1. the statute in question passed—that is, about fifteen years afterwards. Supposing, therefore, this resolution in the case of bankrupts to be law, it must be taken to have been known to be the law at the time when the statute of 1 *James* 1. passed, and it would be strange to suppose, that if the law were intended to have been altered in this respect, it should not have been so expressed: taking it, however, the other way, that the statute meant only, by becoming bankrupt, the act of bankruptcy; then all is clear, and the statute consistent with the law as it stood before, except as to giving protection to a debtor paying, being at the time of payment ignorant of the act of bankruptcy. And this falls in with the general spirit and principles of the bankrupt law. The leading object is

(a) *Smith v. Mills*, 2 *Rep.* 26.

an equal distribution among the creditors.—Payments, therefore, made by the bankrupt are set aside as fraudulent, if made in contemplation of bankruptcy, though the creditor be ignorant of such intention; but where is the guard to the bankrupt's estate, if the bankrupt may, notwithstanding the commission, go round and receive debts due to him before he became bankrupt; and the parties paying may aver ignorance of the commission, and put it upon the assignees to prove actual knowledge?—It is further to be considered, that by the commission all right and power is divested out of the bankrupt: he can make no disposition of his estate and effects; or, in other words, he may be considered as civilly dead, with respect to any power of disposing, in all transactions relative to his property before he become bankrupt. The commission, and the assignment under it, have relation to the act of bankruptcy, and avoid all intermediate transactions, unless specially protected. There is a further authority, to which we have likewise been referred, viz. the case of *Hitchcock v. Sedgwick (a)*, in which it was resolved in Chancery, by two of the commissioners against the third, that when the commission issues, all parties are bound to take notice. The marginal note, as warranted by the text, is, that every one is bound to take notice of a commission of bankrupt when taken out; and the case was decided on that ground. On the words of the statute, therefore; on the sense and reason of the thing, and on the authorities cited; we are of opinion that the commission, in this case, was notice; and that actual knowledge and understanding, as distinguished from legal knowledge and understanding, was not necessary.—It remains to be considered, whether the subsequent statutes referred to in the argument (b) make any difference;

1819.
BROOKS
v.
SOWERBY.

(a) 2 Vern. 161.—(b) 46 Geo. 3. and 49 Geo. 3.

1819.
 {
 BROOKS
 v.
 SOWERBY.

and here again, we have to consider the case, first, on principle. It has been expressly said in the argument at the bar, that it is monstrous that a party in cases of this sort is to be bound by constructive notice, or, in other words, by a payment made in ignorance of a commission; and this has been strongly urged against assigning to the statute such a meaning. But to what do all the latter statutes go, but to make the commission notice; and even if this had never been done before, it at least cuts up by the root all argument of injustice, unless the law itself is to be considered as unjust. By 46 *Geo. 3. c. 135.* not only is a commission of bankrupt made notice of a prior act of bankruptcy, but even the striking a docket is made to be notice; and though this latter provision is afterwards repealed, still the commission is re-enacted to be notice. I urge this at present, not only, in answer to the imputed injustice of such a proceeding, relied on as an argument to prove the legislature could never so intend; but beyond this to shew, that to put such a construction on the statute of 1 *James 1.* is neither inconvenient nor unjust; but only to give it the effect which the legislature, in subsequent times, has thought fit to recognise or introduce, and it is immaterial which, as applied to the argument of injustice on which so much reliance has been placed. The 19 *Geo. 2. c. 32.* protects only receipts from bankrupts; the 46 *Geo. 3.* goes further and applies to payments to, as well as by, bankrupts; and provides, that the issuing a commission, or striking a docket, although such commission shall be superseded, shall be deemed notice of the prior act of bankruptcy: but as it is made so for the purposes of the particular act, it may be argued, that it leaves the statute of *James* as it stood before. Of both, however, the object seems to have been not to make a commission notice of the bankruptcy, as if it had not been notice before, but

to make it notice, even though superseded, which otherwise it would not have been. But with respect to this, it is not necessary to give an opinion; it is enough to say, that on the whole, we think that on the true construction of the statute of 1 Jac. 1. the commission was notice, and that, at any rate, the latter statutes make no alteration in this respect. The judgment, therefore, is, that the plaintiff do recover.

1819.
 ~~~~~  
 BROOKS  
 v.  
 SOWERBY.

My brother *Richardson* having been counsel in this case, while at the bar, declines giving any opinion.

Judgment for the plaintiff.

HICKINBOTHAM v. PERKINS.

Friday,  
 Feb. 12.

THIS was an action of *assumpsit* for money paid, had and received, and on an account stated; and brought by the plaintiff, to try the legality of a claim to, and recover back the sum of 1s. 4d. demanded and taken by the defendant, as farmer and collector of the tolls of a turnpike-road, at a toll-gate called the *Misterton Gate*, in the parish of *Misterton*, in the county of *Leicester*, as

A clause in a turnpike act exempted from toll all carriages employed in the conveyance of materials for repairing the road or any of the highways, in the parishes in which any part of the road lay; and in a subsequent part exempted generally carriages employed in conveying implements of husbandry or manure. In the following clause the trustees were empowered to compound with persons who resided in one parish, and occupied lands in an adjoining parish. The plaintiff's waggon was passing on the road, laden with lime, from one parish to another, for the purpose of the cultivation of his farm, situate in the latter, neither of which were situate in any of those parishes through which the road passed. *Held*, that this being an exemption in the former clause in favour of husbandry, was to be beneficially construed, and that it was not restrained by the subsequent one; and that, consequently, the plaintiff was not liable to the payment of toll.

1819.  
  
 HICKIN-  
 BOTHAM  
 v.  
 PERKINS.

toll for a waggon laden with lime, passing through that gate on the 9th of *February*, 1818. The cause came on for trial at the last assizes at *Leicester*, when a verdict was taken by consent for the plaintiff for 1s. 4d. subject to the opinion of the Court, on the following case :

The defendant, at the time the toll was demanded and taken, was the farmer and collector of the tolls of the said turnpike-gate, erected under the authority of an act of parliament, passed in the fifth year of his present Majesty, intituled, "An act for repairing and widening the road from the turnpike-road, in *Banbury*, in the county of *Oxford*, through *Daventry* and *Cottesbach*, to the south end of *Mill-Field*, in the parish of *Lutterworth*, in the county of *Leicester*," and of two other acts of parliament passed in the 25th and 47th years of his present Majesty, for amending and enlarging the terms and powers of the first-mentioned act:—and on the said 9th of *February*, demanded and received of the plaintiff the sum of 1s. 4d. as and for the toll authorised or claimed to be taken at the said turnpike-gate, in respect of the plaintiff's waggon, drawn by four horses; which sum of 1s. 4d. was the proper toll to be demanded and taken for such waggon and horses, in case the plaintiff, in respect thereof, was not entitled to an exemption from toll. The waggon was laden with lime only; and at the time of taking the toll, was employed only in carrying and conveying such lime from the parish of *Newbold* upon *Avon*, in the county of *Warwick*; to that of *Peatling Magna*, in the county of *Leicester*; to be there used in husbandry, for cultivating, manuring, and improving the land of the plaintiff, situate at the latter parish. The road in question, over which the plaintiff's waggon passed, and for passing along which the toll was taken, was the proper and direct road from *Newbold* upon *Avon*, to *Peatling Magna*; and the waggon passed through the said turnpike-gate, in the necessary prosecution of its journey

from the one place to the other: but both these parishes are at a distance from the turnpike-road, and the road does not pass through any part of the parishes, or either of them.

The plaintiff claimed to be exempted from payment of the toll for his waggon and horses, by virtue of the statute 47 Geo. 3. c. 91. s. 4. (a)

1819.  
  
 HICKIN-  
 BOTHAM  
 v.  
 PERKINS.

(a) By which it is enacted, "That no toll shall be demanded or taken for any horse, cattle, beast, or carriage employed in carrying or conveying, or going to carry or convey, or returning from carrying or conveying, having been employed only in carrying or conveying on the same day, any stones, bricks, timber, wood, gravel, or other materials, for repairing the said road, or any of the highways, or public or private roads, in any of the parishes, townships, or places in which any part of such road lies; or for the purposes of repairing any houses, or other buildings; or to be laid or used in any of the yards, gardens, or homesteads in any of the parishes or places in which such stones, bricks, timber, wood, gravel, or other materials, shall be dug, bought, or procured; or hay, clover, turnips, straw, or corn in the straw only, not sold or disposed of, but passing to be laid up or placed in the out houses, barns, or yards, of the owners thereof; or for any horse, cattle, beast, or carriage, employed only in carrying or conveying, or going unladen or empty, to carry or convey, or returning unladen or empty from carrying or conveying, having been employed only in carrying or conveying any ploughs, harrows, or implements of husbandry, or any lime, mould, dung, compost, or manure employed in husbandry, for manuring or improving lands, or any other thing to be used or employed upon, or for cultivating, manuring, improving, or managing lands; or for any horses, beasts, or cattle, going to or returning from pasture or watering places, or going to be, or returning from being, shod or farried; or from any person going to or returning from his or her parochial church, chapel, or other usual place of religious worship, on a *Sunday*, or upon any other day, on which divine service is, or shall be ordered by authority to be celebrated; or attending the funeral of any person that shall die and be buried in any of the said parishes, hamlets, or places; or from any clergyman going to, or returning from his parochial or ministerial duty, or visiting any sick person.



1819.  
HICKIN-  
BOTHAM  
v.  
PERKINS.

And in the next clause, after reciting, that it might happen that persons residing in some of the parishes, townships, or places through which the road lies, might rent or occupy lands in some other adjoining parish, township, or place, and for the necessary occupation of such farms, might be obliged to have occasion to pass through some toll-gate, erected, or to be erected, by virtue of the said act, between such place of residence, and such farms respectively; and that it might be unreasonable that such occupiers of lands should be charged with the payment of the tolls raised, or to be raised, by virtue of the said recited acts, or that act, it was enacted by sect. 5.(a)

On the 6th of *February*, 1818, the plaintiff gave notice to the defendant and to the trustees of the road, of such his claim of exemption; but the defendant, on the 9th of that month, insisted upon and received the said toll of 1s. 4d. which the plaintiff was compelled to pay, to prevent his waggon and horses from being distrained for such toll.

The question for the opinion of the Court was, whether, by virtue of the act of the 47 Geo. 3. c. 91. s. 4. the plaintiff was or was not entitled, under the circumstances above stated, to exemption from toll, in respect of the said waggon and horses drawing the same. If he were, the verdict was to stand; but if not, to be entered for the defendant.

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(a) "That it should be lawful for the trustees, or any five or more of them, at any public meeting, to compound and agree with all or any of such last mentioned occupiers of lands, who should request the same, for all or any of the tolls at such turnpike-gates, as aforesaid, at such annual sums or payments as the trustees, or any five or more of them, should think reasonable: Provided always, that no compositions or agreements for such tolls should commence, or take effect, until the expiration of the term or terms for which the tolls arising at the several gates, already erected on the said road, or any of them, were then let."

The case came on for argument on a former day in this term, when

1819.  
  
 HICKIN-  
 BOTHAM  
 v.  
 PERKINS.

Mr. Serjeant *Copley*, for the plaintiff, submitted, that he was exempted from the payment of toll, under the 4th section of the statute, and that carriages employed for the carrying or conveying of manure, were altogether exempted from such payment, and were not restricted by the previous antecedents of that clause, as to the carrying materials for repairing roads, which referred only to such repairs being carried in the parishes, townships, or places in which any part of the road lay. That by the General Turnpike Act (*a*), carriages conveying manure were exempted from the payment of tolls; and that by the 19 Geo. 3. c. 62. lime for the improvement of land might be carried coastwise, without the masters of vessels giving any bond for that purpose: the legislature, therefore, have been anxious to give every facility for the conveyance of manure, and the 4th section of the 47 Geo. 3. c. 91. is not confined to carriages conveying manure to land through which the road lies, but contains a general exemption.

Mr. Serjeant *Vaughan*, *contra*, contended, that the 4th section must receive a limited construction, and that if all carriages employed in the conveyance of manure to any place, were to be exempted, it would tend to repeal the preceding part of that clause on which the exemption was founded. It was quite clear, that by the general provisions of the act the plaintiff was liable to pay; and the only question now is, whether this case can be brought within the terms of the 4th section, containing the exemption from tolls; and whether that part of the sec-

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(a) 13 Geo. 3. c. 84.

1819.  
HICKIN-  
BOTHAM  
v.  
PERKINS.

tion, relative to the carriage of manure, over-rides the former part of it, which is confined to carriages conveying materials for repairing the road or highways, in any of the parishes in which any part of the road lay, or where the materials should be procured? As the words, "parishes, or townships," have not been subjoined to carriages used in the conveyance of manure, in the latter part of that section, it has been contended, that all such carriages are entitled to a general exemption. The First exemption from toll, in the fourth clause, is for carriages employed in the conveyance of materials for repairing roads, which is confined to the parishes where the road lay: the Second, for carriages used for the drawing materials for the purposes of repairing buildings in any of the parishes in which such materials shall be dug or procured: the Third for hay, clover, turnips, straw, or corn in the straw not sold or disposed of, but passing, to be laid up in the out-houses or barns of the owners; if, therefore, the plaintiff's waggon contained straw to be laid up, it would not be exempted, as such exemption is confined to owners resident in the parishes where the toll-bar was erected, or where part of the road lay: so, Fourthly, carriages employed in conveying implements of husbandry, lime, and manure, can only be exempted on such manure being used in those parishes through which the line of road lay; and must, consequently, be limited to those parishes or townships which are mentioned in the previous part of the section. Fifthly, persons going to, or returning from church, were exempted from the payment of toll; but in the case of *Lewis v. Hammond* (a), where it was provided by the 37 Geo. 3. that persons going to, or returning from, their proper place of religious wor-

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(a) 2 Barn. and Ald. 206.

ship on *Sundays*, should be exempt from the payment of tolls, it was decided, that the word "parochial" extended over the whole clause; and that, therefore, a dissenter was not within the exemption, in going to, and returning from his proper place of religious worship, situate out of the parish in which he resided. And Lord Chief Justice *Abbott* there said (*a*), "That the exception did not extend generally to all persons going to, or returning from a place of religious worship, nor even to all persons going to, or returning from, their proper place of religious worship; that the gate-keeper might be expected to inform himself as to the persons residing in his parish, the places of worship situate within it, and the hours of usual attendance at them; but that he could not be expected to acquire such information as to other and more distant places:"—So here, the gate-keeper might know whether the manure was to be employed by the plaintiff on his farms, in the line in which the road lay. But by the 5th section of the act in question, the trustees were empowered to compound for tolls with any persons who resided in one parish, and occupied lands in the adjoining parish; all tolls, therefore, which were not exempted by the 4th section, must be compounded for. The 5th section, therefore, by intendment, restrains the former one; and although it has been contended, that the plaintiff is entitled to such exemption, still, by the meaning of the 5th section, it was necessary that he should have compounded, as that section applied to persons residing in the parishes through which the road lay, and renting or occupying lands in an adjoining parish: at all events, carriages employed for the conveyance of manure, were, by the 4th section, limited to the parishes through which the road lay, and the defendant was, therefore, justified in demanding the toll in question from the plaintiff.

1819.  
  
 HICKIN-  
 BOTHAM  
 v.  
 PERKINS.

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(*a*) 2 *Barn. and Ald.* 208.

1819.  
HICKIN-  
BOTHAM  
v.  
PERKINS.

Mr. Serjeant *Copley*, in reply.—The fifth section is wholly inapplicable to the present question: as it could only apply to tolls for which a party was liable under the 4th, for the trustees were only empowered to compound for those tolls to which particular persons would be otherwise liable. All persons were not exempted from payment of tolls by the 4th section, but that clause contained express exemptions for horses and carriages used for particular purposes; and as it was unreasonable that occupiers of lands, in another parish, should be charged with additional tolls, the trustees were empowered to compound as to those persons only. The 4th section exempted from tolls all carriages used for the conveyance of manure, whether employed in the parishes through which the road lay, or not; this, therefore, being a general exemption, is not touched by the subsequent section; neither can such exemption be connected with the former part of the 4th section, as to carriages employed in the conveyance of materials for the repair of roads. In *Lewis v. Hammond*, there was but one proviso for exemption in the clause; and it was held, that the word “parochial” embraced and extended over the whole of that clause: that case is not applicable to the present, and the plaintiff, therefore, is entitled to judgment.

Lord Chief Justice DALLAS.—The only question is, whether the fourth clause, which is general, is restrained and limited by the fifth, which contains a provision, enabling the trustees to compound for all or any of the tolls, payable at the toll-gates, to be erected by virtue of the statute? And it has been said, that this section can only apply to tolls for which a party was liable, under the fourth; and that as the plaintiff's waggon was used for the conveyance of manure, he was exempted from such payment by the latter section.

*Cur. adv. vult.*

His Lordship, on this day, delivered the following judgment of the Court:

1819.  
  
 HICKIN-  
 BOTHAM  
 v.  
 PERKINS.

This was a question on the construction of the 47 Geo. 3. c. 91. which was an act passed for enlarging the terms and powers of two acts of the 5th and 25th years of his present Majesty, for repairing the road from *Banbury*, in the county of *Oxford*, to *Lutterworth*, in the county of *Leicester*, and the only point left for the consideration of the Court is, the construction of the 4th and 5th sections of that statute. [Here his Lordship read the 4th section.] (a) This clause is general, as far as it exempts from toll any carriage employed in carrying lime or manure, for the improving, manuring, or managing land. It is, therefore, an exemption in favour of agriculture, and to be beneficially construed. It contains no reference to persons residing within or out of the parishes through which the road runs; or to lands being situate within or out of such parishes; and this being the case of a waggon carrying lime for the improvement and management of land, the owner would be clearly exempted under this clause, unless, as to him, it were restrained by any clause that follows. And the 5th clause is relied on for the defendant, which, it is said, by necessary intendment, does so restrain and limit the former one.

It is first to be observed, that in this case the plaintiff's waggon was passing along the road, from one parish to another, with a view to the cultivation of his farm situated at the latter; neither of those being in any of the parishes through which the road passes.

The fifth clause is in these words. [Here his Lordship read the clause.] (b) And it is asked, if persons residing within some of the parishes through which the

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(a) *Ante*, 187. — (b) *Ante*, 188.

1819.  
HICKIN-  
BOTHAM  
v.  
PERKINS.

road lies are taken to be liable to toll, passing along the road, and through the toll-gate, for the necessary occupation of lands out of the parish, and have leave given them to compound, how can it be, that persons not living in any of the parishes shall, for the occupation of farms not within them, be exempted from toll?

The answer is, that the first clause being general, and to be literally construed, can only be restrained by express words, or necessary implication. Express words there are none, nor is such a restraint of necessity to be implied; for there are still tolls to which a resident within the parish would be liable, going through the toll-gate, for the occupation of his farm, not falling within the general clause of exemption, and, therefore, when the statute treats him as being liable, it must be taken in respect of such tolls; and the power to compound for all or any, must mean all or any of such a description, which were payable generally, and not those from which all persons were exempted before. These acts are often inaccurately drawn: and even taking the construction of the clause to be doubtful, a doubtful meaning is not a sufficient ground to restrain the operation of a general clause, which in its own terms is clear and precise; and, least of all, when it is to narrow and repeal a provision, which, for the public benefit, ought to be largely and beneficially construed. The plaintiff is, therefore, entitled to judgment.

Judgment for the plaintiff accordingly.

END OF HILARY TERM.

It is with great reluctance that the Editor has submitted to the profession the Cases decided in the last *Hilary*, before the publication of those in the three antecedent Terms; but he has been induced to do so by the anxious recommendation of his friends, and in consequence of the importance of several of the Cases contained in this Number, which are about to undergo further enquiry in other Courts. He will use every possible exertion to complete his Second Volume without delay, which has been occasioned by his preparing another work; and, feeling the great advantage of an early publication, will continue his Reports regularly from the present period.





# C A S E S

ARGUED AND DETERMINED

IN THE

**Courts of Common Pleas**

AND

**Exchequer Chamber,**

IN

*EASTER TERM,*

IN THE

**FIFTY-NINTH YEAR OF THE REIGN OF GEORGE III.**

## SHAW v. SUMMERS, DRAKE, EDMONDS, and COLLACOTT.

Under a power to trustees "to lease premises for a term not exceeding twenty-one years, and determinable as a former term of ninety-nine years was determinable, as they should think proper."

*Held*, that such a power authorized only a lease in possession, and not *in futuro*; and as the trustees had let the premises for ten years, determinable as in the original lease, and afterwards relet them for the term of eleven years, before the expiration of the ten years lease, that the second lease was void, and a bad execution of the power.

A CASE, of which the following is the substance, was sent by the direction of the late Master of the Rolls, for the opinion of the Judges of this Court:

The plaintiff was possessed of, and entitled to a certain leasehold messuage and premises, under a lease, duly executed to him, bearing date the 27th of *December*, 1779: To hold for the term of ninety-nine years, from that day, if he the plaintiff and his two sons, *Joseph* and *Benjamin*, or any or either of them, should so long live; but subject to a mortgage to one *Richard Hart*.

By an indenture of assignment and further mortgage, dated the 21st of *February*, 1794, and made and executed by the said *Richard Hart*, of the first part, the plaintiff of the second, and one *Abraham Spiller* of the third;—*Hart*, in consideration of the sum of £281., to him paid by *Spiller*, in full satisfaction and discharge of the principal money and interest, due to him from the plaintiff and one *John Woolcott*, on security of the said premises, granted, bargained, sold, transferred, and set over; and the plaintiff, in consideration of the said sum of £281., so paid as aforesaid, and also in consideration of the further sum of £19., to him paid by *Spiller*, making together the sum of £300., ratified and confirmed unto *Spiller*, his executors, administrators, and assigns, all the aforesaid premises, and all the estate, right, title, interest, &c. of them the said *Richard Hart* and the plaintiff, of, into, or out of the said hereditaments and premises, together with the original indenture of

lease of the 27th of *December*, 1779, and all other deeds relating thereto, for the rest, residue, and remainder, of the said term of ninety-nine years then to come and unexpired, determinable as aforesaid, subject nevertheless to the yearly rent, and to the covenants and agreements in the original indenture of lease of the 27th of *December*, 1779, mentioned and contained, and also subject to a proviso for redemption of the said premises, mentioned and contained in the said indenture of the 21st of *February*, 1794, upon payment to *Spiller* of £300, with interest by the plaintiff on the 21st of *August*, then next ensuing:—The said sum of £300, and interest, was not paid according to the above proviso.

By another indenture, dated the 5th *December*, 1798, and made between the plaintiff of the first, *Spiller* of the second, the defendant *Drake*, of the third, and one *John Woolcott* of the fourth part: It was recited that *Spiller* had called on the plaintiff for payment of the said sum of £300, and interest, and that in order to raise money for the payment thereof, the plaintiff had agreed to grant and assign all the said premises to *Drake*, his executors, administrators, and assigns, on the trusts herein-after mentioned; he, the plaintiff, granted, bargained, sold, transferred, and set over, all the same leasehold premises, and all the estate, right, title, and equity of redemption of him the plaintiff therein unto *Drake*, his executors, administrators, and assigns, for all the remainder of the said term of ninety-nine years then to come and unexpired, determinable as aforesaid: Upon trust and to the intent that *Drake*, his executors, administrators, or assigns, should at any time thereafter, at the request and by the direction of *Spiller*, his executors, administrators, or assigns, but without, and even against the further consent and approbation of the plaintiff, his executors, &c.

1819.  
SHAW  
v.  
SUMMERS.

1819.  
—  
SHAW  
v.  
SUMMERS.

absolutely sell and dispose of the said premises or any part thereof, and with the purchase money reimburse all expenses attending such sale, and then upon trust to pay to *Spiller*, his executors, &c. if the residue of such purchase money should be sufficient, the said sum of £300, mortgage money, and all such sums of money as he or they should have paid or been put unto in or about repairing the said premises, together with all interest which should then be due for the same respectively, and all costs and expenses attending the non-payment thereof, and after such payments, if any residue should remain, to pay the same to the plaintiff, his executors, administrators, or assigns; and—"Upon the further trust that *Drake* or *Spiller*, their executors, administrators, or assigns, either together or separately, did and should in the mean time, and until such sale or sales as aforesaid, set and let the said premises thereby granted as aforesaid, or intended so to be, with their appurtenances in such parts and parcels, manner and form, and for such time and term, not exceeding twenty-one years, and determinable as the said term of ninety-nine years was determinable, as they, any, or either of them should think proper, and receive and take the rents and profits thereof from time to time as the same should become due and payable, and pay and apply the same towards the paying, satisfying, and discharging the said several sums of money, costs, and expenses, as therein mentioned, and the said sum of £300, and the costs and expenses attending the non-payment thereof, together with lawful interest for the same respectively."

By indenture of demise, dated the 6th of *December*, 1798, made between the plaintiff, *Spiller*, and *Drake*, of the one part, and *Nathaniel Burridge*, since deceased, of the other part, and which indenture was duly executed

by all the parties, *Spiller* and *Drake* demised and let all the same leasehold premises to *Burridge*: To hold the same for a term of ten years, from the 22d of *July*, 1799, determinable as in the original lease, under a yearly rent of £52.—*Spiller* afterwards died, and by his will appointed his wife sole executrix, who duly proved the same.

By an indenture, dated the 28th of *February*, 1807, made and executed by *Rebecca* the widow and executrix of *Spiller* of the one part, and *Summers* the defendant, of the other part, (after various recitals therein contained), in consideration of the sum of £244 : 6s. : 11d., being the money then due to *Spiller's* executrix for principal and interest on the said mortgage which had been so made or assigned to her late husband; she bargained, sold, transferred, and set over unto *Summers*, his executors, administrators, and assigns, all the hereinbefore mentioned leasehold hereditaments and premises, then in the occupation of one *Stone*, as tenant thereof, and all the estate, right, title, &c. of her, the executrix, of and to the said premises, together with all deeds: To hold the same unto *Summers*, his executors, &c. from thenceforth for and during all the rest, residue, and remainder, of the said term of ninety-nine years, but determinable on the several deaths of the plaintiff and his two sons, under and subject to the payment of the yearly rent, covenants, and agreements in the original indenture of lease contained.

*Burridge* having died, one *Harris* became his legal personal representative, and as such entitled to all *Burridge's* right and interest, under and by virtue of the said indenture of lease of the 6th of *December*, 1798, and in the month of *September*, 1807, the premises comprised in the last-mentioned indenture were in the occupation of *Stone* as tenant, from year to year, under *Harris*, and

1819.  
 SHAW  
 v.  
 SUMMERS.

1819.  
SHAW  
v.  
SUMMERS.

in the last-mentioned month, the defendant, *Edmonds*, purchased all *Harris's* right, interest, and title to the premises, which extended to and comprised the whole of the residue and remainder of the said term of ten years, under and by virtue of the said indenture of lease of the 6th of *December*, 1798, for the sum of £20, and thereupon the last-mentioned indenture was, by the consent and agreement of *Harris*, *Stone*, *Edmonds*, and *Summers*, cancelled and destroyed.'

By an indenture of demise therein expressed to be of three parts, dated the 25th of *December*, 1807, expressed to be made between the plaintiff of the first, *Summers*, of the second, and *Edmonds*, of the third part, which indenture was not executed by the plaintiff, but was duly executed by the defendants, *Summers* and *Edmonds*, after reciting the indenture of the 5th of *December*, 1798, and the power for *Drake* or *Spiller*, their executors, administrators, or assigns, to let or set the said premises, before any sale should be made, for any time or term not exceeding twenty-one years, and that the plaintiff did thereby covenant to execute a lease of the said premises when required, and also reciting the death of *Spiller*, and that no sale had taken place in his life time, nor had *Drake* made any sale of the said premises or any part thereof since his death, or otherwise disposed thereof, other than and except the indenture of lease, dated 6th *December*, 1798, to *Burridge* for the term of ten years, subject to the rents, covenants, and agreements therein mentioned, and which said lease was already or then about to be cancelled; and also reciting the indenture of assignment, dated the 28th of *February*, 1807, and made between the said *Rebecca Spiller*, as executrix, of the one part, and the defendant *Summers* of the other part: *Summers*, for and in consideration of the yearly rent, covenants, conditions, pro-

1819.  
 SHAW  
 v.  
 SUMMERS.

visos, exceptions, and agreements thereafter reserved, mentioned, and contained, on the part and behalf of the defendant, *Edmonds*, his executors, administrators, and assigns, to be paid, done, observed, and performed, did demise, set, and to farm let unto *Edmonds*, all that the same messuage and premises then in the possession of *Richard Stone*, as tenant thereof, together with all the appurtenances whatsoever thereto belonging (except and always reserved to *Summers*, his executors, administrators, and assigns, all royalties, casual profits, and franchises, and full and free liberty for him and them, or his and their workmen and attendants, at any time during the term thereby demised, to enter into and view the state and condition of the said premises, and repair and amend the same :) To hold the said messuage or tenement, and all other the premises thereby demised with the appurtenances (except as before excepted) unto *Edmonds*, his executors, administrators, and assigns, from the 22d day of *July* next ensuing the date thereof, for and during the term of eleven years from thence next ensuing, if the estate and interest of the plaintiff and the defendant *Summers*, their executors, administrators, and assigns, or any or either of them therein, should so long continue and endure; paying yearly unto *Summers*, his executors, administrators, and assigns, during so many years of the said term as should run out and expire, before such sale or sales as therein aforesaid, and from and after such sale or sales, unto such person or persons as should be entitled to the said premises during the then residue of the said term, the yearly rent or sum of £55, by four equal payments, on four certain days therein mentioned: the first payment to be made on the 22d of *October* next ensuing the date thereof.

The question for the opinion of the Court was, whether the lease made to *Edmonds*, by the indenture of the



1819.  
  
 SHAW  
 v.  
 SUMMERS.

26th of *December*, 1807, was a good lease under the power contained in the indenture of the 5th of *December*, 1798?

The case came on for argument in the course of the last term, when

Mr. Serjt. *Copley*, for the plaintiff, submitted, that the lease made to *Edmonds* under the power was void, as being granted to commence *in futuro*. It has been laid down as a principle in the case of the Countess of *Sussex* v. *Wroth* (a), that a general power to lease for a certain number of years, without saying either in possession or reversion, authorises only a lease in possession, and not *in futuro*; and that it, being a liberty and power, must be strictly pursued. But if the estate be in lease at the time of the creation of the power, it is a question whether a lease in reversion may not be granted; for, otherwise, it is said the power would be ineffectual. But in the Marquis of *Northampton's* case (b) though it was held, that if a power had been to lease generally, without saying *in possession*, the lease might have been made to commence at the end of the lease then *in esse*; and *Manwood* and *Dyer*, in that case, thought the lease good: yet *Mounson* was of a contrary opinion; and by the marginal note in *Dyer*, all of which were the productions of Lord Chief Justice *Treby*, his Lordship appears to have agreed with *Mounson*, and considered his as being the better opinion. In *Baynes* v. *Belson* (c) it was held, that such a lease was void, and that the power was not well executed, the lease being to commence *in futuro*. In the more recent case of the Earl of *Coventry* v. *Coventry* (d), it was held, that

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(a) *Cro. Eliz.* 5. S. C. cited in *Fitzwilliam's* case; 6 *Rep.* 33 *nomine* *Leaper* v. *Wroth*.—(b) *Dyer*, 357.—(c) *Sir T. Raym.* 247.—(d) 1 *Com.* 312.

such execution of the power was good; but it was there stated by the Chief Justice, that a general power must be restrained to leases in possession; yet, if there were any thing to explain the intention of the parties to extend to make a lease in reversion, it might be extended thereto. The principle, therefore, laid down by all these cases, has established that a general power to lease for a certain number of years, does not authorise leases in reversion or *in futuro*, but must be restrained to leases in possession. This, however, may be extended by the intention of the parties; but there is nothing on the face of the instrument in this case to show an intention to create leases in reversion; but, on the contrary, it is quite the reverse. In all the cases which have been determined on this point, the lease in reversion was granted for the number of years mentioned in the power, and never exceeded that term. A power must be strictly pursued in form and in substance, *Taylor d. Atkyns v. Horde* (a), *Earl of Darlington v. Pulteney* (b); so the deeds to execute a power must be duly attested, *Wright v. Wakeford* (c), *Doe d. Mansfield v. Peach* (d).—It was held in *Fitzwilliam's* case (e), that if a person is bound, or contracts with another to make a lease for twenty-one years indefinitely, such lease ought to be made to begin presently, and not *in futuro*. If that be so in cases of contract, *a fortiori* does it apply to powers: for the one must be construed with greater strictness than the other; and the position there laid down is not only illustrative, but decisive, as to the present question. It is immaterial whether the lease expire within the twenty-one years or not; for if a lease in possession for ten years be granted by the donee, another lease in

1819.  
  
 SHAW  
 v.  
 SUMMERS.

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(a) 1 Burr. 120.—(b) Cowp. 267.—(c) 4 Taunt. 213.  
 —(d) 2 Maule and Sel. 576.—(e) 6 Rep. 33.

1819.  
SHAW  
v.  
SUMMERS.

reversion cannot be granted for the remaining eleven years, under a general power, because he could not make a lease in reversion; and yet the whole estate would be only charged for twenty-one years, which would be within the terms of the power. No distinction in this respect can be drawn between a lease in reversion and *in futuro*; for an estate in the one is precisely similar to an estate in the other. In the case of *Doe d. Pulteney v. Cavan (a)*, a lease was in existence under a power of leasing, and a further term was granted under the same power to the person in whom the first lease was vested, and the terms did not exceed together the number of years for which leases were authorised to be granted, and yet the second lease was not considered as a continuation of the first, and was held void. There the power was restricted to make leases in possession, and not in reversion; but when a power is in general terms, it must receive a similar construction; for what is expressed in the one must be understood in the other. Here, there is no evidence of an intention to grant a lease *in futuro*; but the power, in its terms, expressly implies that the parties contemplated an immediate lease to be executed. The estate, too, was in mortgage. Such mortgage might be paid off, and it would be productive of the greatest inconvenience to the owner to be charged with a lease *in futuro*. If such a lease can be sustained, any number, with intervals, may be granted; besides, it would tend to the non-improvement of the estate. On general principles, therefore, the intention of the parties, and former decisions, the lease in question is void, as it was granted to commence *in futuro*.

Mr. Serjt. *Hullock*, *contra*, insisted that the lease was

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(a) 5 T. R. 567.

a good execution of the power. No objection has been raised as to the power of *Drake* or *Spiller* to grant a lease, nor as to the time of its termination; but it has been contended that the lease in question is void, on the sole ground that it was a lease in reversion, and therefore a defective execution of the power. The mere cancellation of a lease will not defeat the estate created by it, *Roe d. Berkeley v. the Archbishop of York* (a). It has been said, that if a power be general in its terms, it does not authorise a lease to be granted in reversion. In all the cases that have been cited for the plaintiff, there have been defects in, or radical objections to, the leases on which the questions have been raised, on different grounds, and wholly beside the present question. *Doe d. Pulteney v. Cavan* (b) was disposed of without argument, as it appeared that the rent reserved was not the rent required by the power. In the case of the Countess of *Sussex v. Wroth* (c) the second lease exceeded the terms of the power: so, *Fitzwilliam's case* (d), was decided on the construction of a covenant, and is not applicable to the present question. If a person covenant to grant a lease for twenty-one years, it is quite clear that such lease must be intended to operate immediately, and not to commence at any distance of time; or, at all events, it must be executed within a reasonable time. Powers of this description are not to be construed strictly, for Lord *Kenyon*, in the case of *Pomery v. Partington* (e), said that the intention of the parties must govern the Court in construing the instrument. The lease containing the power was executed by the plaintiff himself, by which *Drake* and *Spiller* were empowered to let the

1819.  
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 SHAW
 V.
 SUMMERS.

(a) 6 E. R. 86.—(b) 5 T. R. 567.—(c) *Cro. Eliz.* 5.
 —(d) 6 Rep. 32.—(e) 3 T. R. 674.

1819.
 {
 SHAW
 v.
 SUMMERS.

premises thereby granted for such term, not exceeding twenty-one years, as they should think proper. That was clearly a power to grant a lease *in futuro*. It has been said, that it would produce inconvenience to the owner if a lease like the one in question could be granted. But the power is improvident in itself; for it is quite immaterial whether *Drake* and *Spiller* had granted ten intermediate leases, each to expire at intervals, namely, at the end of two years successively, or whether they had granted one lease, to be determined at the expiration of twenty years. The clear intention of the parties was, for the plaintiff to enable the trustees to grant any lease they should think proper, provided it did not exceed twenty-one years. A power to grant a lease may, by the particular wording of it, authorise a lease in reversion, although not so expressly stated, and the estate is not in lease at the time of the creation of the power, *Harcourt v. Pole* (a). The lease granted to *Edmonds* in 1807, for the term of eleven years, from the 22d of July in that year, would expire before the twenty-one years granted by the power, and the acceptance of that lease merely operated as a surrender of the first. It is not clear that the lease in question was a lease in reversion, but it has been decided in the case of *Goodtitle d. Clarges v. Fumucan* (b), that where the lease is to take effect in possession it will be good, although the estate is in the possession of tenants from year to year, or at will, provided they, at the time the lease is granted, receive directions to pay their rent to the lessee. The lessees at will, and from year to year, in that case, had attorned to the lessee under the power; and at the trial

(a) 1 *Anders.* 273.—(b) 2 *Doug.* 565.

it was left to the jury, whether the attornment of the occupiers to the defendant, in consequence of the directions given them at the time of making the indenture, did not amount to a surrender by them, and whether they were not to be considered as having thereby become parties to the lease, and as having put the defendant in possession? and they were of that opinion, and found a verdict accordingly: so here, *Stone* agreed to the cancellation of the first lease, which amounted to an attornment. In *Roe d. Brune v. Prideaux* (a), Lord *Ellenborough* held, "That a chattel lease might be granted, pending a prior subsisting one, provided it were within the limits of the power, and provided it gave no beneficial interest during the continuance of the subsisting lease:" so here, the lease in question was within the limits of the power; and his Lordship, in that case, added, "That the right of granting a second chattel lease was settled in *Read v. Nashe* (b), and recognised as law by Lord *Mansfield* in the case of *Goodtitle v. Farnham*." (c). For Lord *Mansfield* there said, "That it had been answered to the objection, that the lease there was a lease in reversion; that if the jury had not found the defendant to have been in possession, still that the lease would be good as a concurrent lease;" in support of which *Read v. Nashe* was cited, and his Lordship added, that the reason given in that case was a strong one, viz. that the inheritance was not charged in the whole with more than twenty-one years. On principle, therefore, and in point of law, the lease here of the 21st of *December*, 1807, was a valid lease, and a good execution of the power contained in the indenture of the 5th of *December*, 1798.

1819.

 SHAW
 v.
 SUMMERS.

(a) 10 E. R. 184.—(b) 1 Leon. 148.—(c) 2 Dougl. 573.

1819.
 ~~~~~  
 SHAW  
 v.  
 SUMMERS.

Mr. Serjt. Copley, in reply, observed, that *Doe d. Pulteney v. Cavan* (a) was decided by the Court on both the questions raised for the plaintiff in that case. *Fitzwilliam's* case (b) is illustrative of the construction of a power, where a lease is to be granted for twenty-one years indefinitely, as it was there resolved that such lease must be made presently, and not *in futuro*. The case of the Countess of *Sussex v. Wroth* (c), was there cited as containing observations applicable to, and in illustration of the latter. Nothing here turns on the first lease containing a power to lease *in futuro*; for although the plaintiff gave validity to that lease by being a party to it, still he did not mean that such power should extend to future leases. If the question here depended on the terms of the power, the intention of the parties must be looked at; for the Court cannot go out of the deed itself, unless there be some direct evidence of the intention of the parties, as in *Coventry v. Coventry* (d). The case of *Harcourt v. Poole* (e) was decided on the particular wording of the power. In *Goodtitle d. Clarges v. Fumucan* (f) there was a power for the tenants for life to grant leases, when they should be in actual possession of the premises settled; and it was there contended, that Lord *Ferrers*, the lessor at the time of the demise made by him, could not grant an immediate lease in possession, because part of the premises were then let under an express agreement for a term of which several months were then to run; and though the rest were stated to have been in the hands of tenants at will, yet as the law then stood, that they must be considered as tenants from year to year. But not only the lessees at will, but those from year to year,

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(a) 5 T. R. 567.—(b) 6 Rep. 32.—(c) Cro. Elis. 5.—  
 (d) 1 Com. 312.—(e) 1 Anders. 273.—(f) 2 Doug. 505.

had in that case attorned to the lessee under the power, and Lord Chief Baron *Eyre* left it to the jury at the trial, whether the attornment by such tenants did not amount to a surrender, and they found that by the attornment of such occupiers to the defendant they surrendered their interest. But this is not the case of a lease in possession. The doctrine laid down by Lord *Ellenborough* in *Roe d. Brune v. Prideaux* (a), and relied on for the defendant in this case, might be considered as a mere *obiter dictum*, for his Lordship there stated the distinction to be, that a chattel lease might be granted, pending a prior subsisting one, provided it were within the limits of the power; but that so long as there was a freehold lease *in esse*, a second freehold lease could not be granted. But that case is not applicable to the present; for here the interest in the former lease was destroyed, and the latter ratified its cancellation. The latter, therefore, was clearly a lease *in futuro*; and there was no prior lease subsisting at the time it was made. As the power in the former lease was general in its terms, it could only apply to leases in possession; and, as in *Fitzwilliam's case* (b), it was resolved that a contract for a lease for an indefinite number of years must be made presently, and not *in futuro*—*a fortiori* will that rule apply to powers to grant leases, which must be strictly pursued, both in form and in substance.

1819.  
  
 SHAW  
 v.  
 SUMMERS.

The following certificate was afterwards sent to the Master of the Rolls:

"We have heard this case argued by counsel, and have considered it; and we are of opinion, that the

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(a) 10 E. R. 184.—(b) 6 Rrp. 33. .



1819.  
  
 SHAW  
 v.  
 SUMMERS.

lease made to the said *James Edmonds*, by the indenture of the 25th of *December*, 1807, is not a good lease under the power contained in the indenture of the 5th of *December*, 1798.

*Feb. 25*, 1819.

" R. DALLAS,  
 " J. A. PARK,  
 " J. BURROUGH,  
 " J. RICHARDSON."

Wednesday,  
 April 28.

Sir JOHN SWINBURNE and Wife, plaintiffs; SWINBURNE, deforciant.

If there be two *præcipes* to a fine, and the premises be described in the one as manors, tithes, and tenements, and in the other as tenements only :— The Court will not allow the fine to pass.

Mr. Serjeant *Hullock* moved that this fine might now pass, notwithstanding there might be a mistake in the concord. There had been two *præcipes*; one for *Essex*, and another for *Southampton*. In the first, the premises intended to pass, were described as manors, tithes, and tenements, and in the second as tenements only. He observed that the only doubt was, whether the manors, tithes, and tenements were confined to that *præcipe* alone, or could be extended to the latter also. He submitted that the word tenements alone would have been sufficient in the former *præcipe*, and that "manors and tithes" might be rejected as surplusage.

But the Court held, that as the concord recited both the *præcipes*, and the words "manors and tithes" were only to be found in one of them, that the fine should be re-acknowledged, and that if any difficulty arose on such re-acknowledgment, that it might be then mentioned to the Court.

## WATKINS v. HEWLETT.

Wednesday,  
April 28.

THIS was an action of *assumpsit*, on the common money counts, and brought by the plaintiff to recover the sum of £35, paid by him to the defendant, as an overseer of the poor of the parish of *Horfield*, to indemnify that parish against the expenses that might be incurred by the birth of a bastard child, of which the plaintiff was the reputed father, and which was likely to become chargeable to the parish. At the trial of the cause before Lord Chief Justice *Dallas*, at *Guildhall*, at the sittings after the last term, it appeared that the child died a few days after its birth, and as the parish had incurred no expense, it was insisted for the plaintiff that he was entitled to recover. In order to shew that he had paid the above sum to the defendant, as overseer, the following document was given in evidence:

"Received, the 1st of *July*, 1818, of Mr. *Watkins*, the sum of £35, by a bill of exchange, payable at two months after date, which, when paid, will exonerate him from the expenses attending the birth of an illegitimate child, to which he is now chargeable."

Signed by the defendant, as overseer.

It was also proved that the defendant had indorsed this bill of exchange, and that it was paid by the plaintiff when due. On the production of the above instrument, it was discovered that it bore only a receipt stamp, when it was submitted that such stamp was in-

VOL. III.

Q

An instrument given by an overseer of the poor to the reputed father of a bastard child, stating, that he had received a sum of money from the latter by a bill of exchange, payable after date, and which, when paid, would exonerate him from the expenses attending the birth and maintenance of such child, does not require an agreement stamp within 55 *Geo. 3. c. 184*: schedule part 1; but a receipt stamp is sufficient for such a document.

1819.  
 WATKINS  
 v.  
 HEWLETT.

sufficient, as by the 55 *Geo. 3. c. 184*, Schedule part 1 (*a*), an agreement stamp was necessary, and that, consequently, the plaintiff could not maintain this action. His Lordship, however, was of opinion, that a receipt stamp was sufficient, and the jury accordingly found a verdict for the plaintiff; but the point was reserved for the consideration of the Court.

Mr. Serjt. *Hullock* now applied for a rule *nisi*, that this verdict might be set aside, and a nonsuit entered; and insisted, that as the instrument in question was offered as evidence of a contract, and was the only document to prove the receipt of the money by the defendant, and on which alone the plaintiff could recover, that it required an agreement stamp as a memorandum or minute of an agreement within the 55 *Geo. 3. c. 184*, and observed, that wherever an instrument expressed terms *ultra* a receipt, that it must be considered as a memorandum for an agreement, and therefore requiring an agreement stamp.

Lord Chief Justice DALLAS.—The instrument given by the defendant to the plaintiff acknowledged that the former had received a certain sum from the latter, by a bill of exchange, which, when paid, would discharge the plaintiff *in toto*, or amount to a receipt in full for all the

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(*a*) By which, an agreement, or any minute or memorandum of an agreement, made in *England*, under hand only, or made in *Scotland*, without any clause of registration (*and not otherwise charged in that Schedule, nor expressly exempted from all stamp duty*), where the matter thereof shall be of the value of £20, or upwards, whether the same shall be only evidence of a contract, or obligatory upon the parties, from its being a written instrument, together with every schedule, receipt, or other matter put or indorsed thereon, or annexed thereto;—an agreement stamp is necessary, according to the number of words such instrument may contain.

charges he might thereafter be liable to, in respect of the birth of an illegitimate child, I therefore thought, at the trial, that this might be considered as a receipt; and, consequently, that it did not require an agreement stamp within the 55 Geo. 3. c. 184. Sched. part 1.

1819.  
WATKINS  
v.  
HEWLETT.

Mr. Justice PARK concurred.

Mr. Justice BURROUGH.—As the child died immediately after its birth, without any expense being incurred by the parish, the plaintiff was legally entitled to recover this sum from the defendant; and the right to recover did not proceed on a contract, but on the facts which occurred subsequent to the payment, namely, the birth and death of the child.

Mr. Justice RICHARDSON.—If a receipt for £500 be given by an individual to a builder, who has acknowledged to have received it for a house to be built, can it be contended that such an instrument requires an agreement stamp? The present action could not have been sustained on an agreement. The document given by the defendant to the plaintiff was, in fact, a receipt, to shew that the former had received a certain sum of money on account of an illegitimate child, for the expenses of maintaining which the plaintiff might be liable. If the child were not born, the plaintiff was clearly and legally entitled to recover back the whole of the money from the defendant.

Rule refused (a).

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(a) That the plaintiff is entitled, by law, to recover under the circumstances of this case, see *Townson v. Wilson*, 1 Camp. 396; *Staniforth v. Staggs*, 1 Camp. 398, n.; *Rex v. Martin*, 2 Camp. 268; *Cole v. Gower*, 6 East, 110; *Middleham v. Bellamy*, 1 Maule and Sel. 310.

Saturday,  
May 1.

BONFELLOW V. STEWARD.

A declaration on a bail-bond, in setting out the condition, stated, that if the defendant should appear to answer the plaintiff, "*according to the custom of his Majesty's Court of Common Bench*," here the obligation should be void. On the production of the bond, the former words were omitted: *Held*, that this was no variance, as it was only necessary to set out the condition according to its legal effect.

THIS was an action on a bail-bond, and brought against the defendant by the plaintiff, as assignee of the Sheriff of *Essex*. The declaration stated, that the defendant, by his writing obligatory, acknowledged himself to be held and firmly bound to the plaintiff, as sheriff, in the sum of £38, to be paid to the said sheriff, &c. with a certain condition thereunder written, that if the defendant should appear before the Justices of our Lord the King at *Westminster*, in fifteen days of *Easter*, to answer to the said plaintiff, *according to the custom of his Majesty's Court of Common Bench*, here, in a certain plea of trespass on the case upon promises, to the damage of the plaintiff of £40, then that the obligation should be void, and of no force.—At the trial of the cause before Mr. Justice *Park*, at the last assizes at *Chelmsford*, on the production of the bond, it appeared that it did not contain, in the condition, the words "*according to the custom of his Majesty's Court of Common Bench*," as stated in the declaration; when it was objected, for the defendant, that this omission was a fatal variance, as the declaration affected to set forth the condition *verbatim*. The learned Judge, however, refused to nonsuit the plaintiff, but directed the jury to find a verdict for him, with liberty for the defendant to move to enter a nonsuit.

Mr. Serjeant *Blosset* now moved for a rule *nisi*, to set aside this verdict; and that, instead thereof, a nonsuit might be entered; and that the plaintiff, at the time of shewing cause against this rule, might be ordered to produce the bail-bond mentioned in the declaration. He submitted that the variance was fatal, and relied on the

case of *Stiles v. Rawlins* (a), which was an action for a false return, where the declaration, in setting out a writ of *feri facias*, stated the indorsement to levy £600, together with the sheriff's poundage, officers' fees, and other legal charges and incidental expenses attending the levy; and the writ given in evidence was indorsed to levy £600, together with the sheriff's poundage, officers' fees, &c.: this was held to be a fatal variance.

He admitted that there was a distinction between setting out a deed according to the legal effect, and setting out a condition on oyer; but observed, that there was no authority to shew that a condition of a bail-bond could be set out according to the legal effect.—But,

The Court held, that the objection was immaterial, and that it must be inferred that the defendant was to answer the plaintiff according to the custom of the Court: and that the declaration need not set out the condition *verbatim*, but only according to its legal effect.

Rule refused.

1819.  
BONFELLOW  
v.  
STEWART.

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(a) 5 *Esp. Ni. Pri. Cas.* 133. See also *Wagh v. Bus-*  
*sell*, 1 *Marsh.* 214.

Saturday,  
May 1.

BOWER, clerk, v. MAJOR.

In an action for not setting out tithes, where the defendant had been under a pecuniary composition with the plaintiff.

*Held*, that parol evidence of the defendant, stating his refusal to pay, and that there was a *modus* in the parish, and denying the plaintiff's right to take tithes, is sufficient to determine such composition, without any agreement or notice for that purpose.

THIS was an action of debt on the statute 2 and 3 *Edward* 6. c. 13. s. 1. for not setting out tithes.—At the trial of the cause before Mr. Justice *Best*, at the last assizes at *Taunton*, it appeared that the plaintiff was the rector of *Staple Fitzpayne*, and that previously to the commencement of the present action, the defendant had been under a pecuniary composition with him for all his tithes; and the only question was, whether that composition had been determined. There was no evidence of its determination, either by agreement or notice; but the plaintiff, in order to shew that he had a right to recover the treble value, without a notice in writing, called a witness, who proved that the defendant, in a conversation with him, stated, as a reason of his refusal to pay the tithes, "That he was certain there was a *modus* in the parish, and that he was not, therefore, bound to set them out; and he also denied the plaintiff's right to take them;" when it was objected for the defendant, that although he had verbally denied the plaintiff's right, still that a notice was absolutely necessary to determine the composition. The learned Judge, however, was of opinion that such denial of the plaintiff's title was sufficient; but as no case was cited as an authority, in support of the objection, and as he thought it was a new point, he reserved the question for the consideration of the Court. The jury accordingly found a verdict for the plaintiff.

Mr. Serjt. *Pell* now moved for a new trial, on the above objection, But,

The Court were clearly of opinion, that the refusal of the defendant to pay, and the reasons he had assigned for so doing, were quite inconsistent with the composition, and were of themselves a sufficient notice of its determination.

1819.  
BOWER  
v.  
MAJOR.

Rule refused.

TOUISSANT v. DARLAM.

Saturday,  
May 1.

THIS was an action on the case, and brought against the defendant, a wine-cooper, for fraudulently changing some wine, which the plaintiff had entrusted her to convey from *Hampstead* to *London*. At the trial of the cause before Lord Chief Justice *Dallas*, at the sittings at *Westminster*, after the last term, it appeared that the plaintiff had purchased a quantity of wine at a quay, for which he had paid the duty; and that it was accordingly removed to his cellar at *Hampstead*. That having remained there some time, a friend of his in *London* proposed to take part of it, to which the plaintiff acceded, and the defendant was in consequence employed to remove it; and that she undertook to get a proper permit for that purpose. Part of it was accordingly

The plaintiff purchased a quantity of wine, for which he paid the duties; and it was accordingly removed to his house. He afterwards disposed of part of it to a friend, and employed the defendant to convey it, who promised to obtain a permit for that purpose. The defendant's

servant changed the wine during its transfer. *Held*, that the plaintiff was entitled to recover, although the defence relied on was, that the removal took place contrary to the Excise laws.

*Quære*, Whether a private individual, having sold wine to a third person, for which he had paid the duties, and which constituted part of his stock, can remove such wine without taking out a licence for that purpose?

*Quære*, also, Whether such individual can remove wine, so sold, under the 26 *Geo. 3. c. 59. s. 33.* although he might have obtained a permit for so doing?



1819.  
  
 TOUISSANT  
 v.  
 DARLAM.

delivered in *London*, but twelve dozen were left at the defendant's house, as it was said that it was too late in the evening to deliver the residue. For the plaintiff, it was proved, that either the defendant or her foreman changed the wine left at her house during the night, and that on the following morning she sent the like quantity, of a very inferior description. His Lordship, considering that this was a gross breach of trust, directed the jury to find a verdict for the plaintiff, which they accordingly did.

Mr. Serjt. *Lens* now moved for a rule to shew cause why this verdict should not be set aside, and a nonsuit entered, on the ground that a private individual could not remove wine, which constituted a part of his stock, and which he had disposed of to another, without taking out a licence for that purpose: That the transfer of wines was regulated by the Excise laws; and that the wine in question could not have been removed at all, as no permit would have been granted for that purpose: That a private person could not, as a vendor, dispose of wine which he had previously purchased, and that he was merely empowered to give it away or remove it, by permit, from one of his own cellars to another: That by the 26 *Geo. 3. c. 59. ss. 8. and 11.* no private person could sell wine; that none but wholesale or retail dealers could so do, who were not empowered to transfer such wine without having first obtained a licence for that purpose; and that by section 33 (*a*), a private person (not being such dealer)

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(*a*) By which it is enacted, "That where any person, not being a dealer in, or seller of foreign wine, either by wholesale or by retail, shall have occasion to remove any such wine from any part of this kingdom to any other part thereof, it shall be lawful for the officer or officers of Excise of the respective divisions in which the place from whence such wine is intended to be removed shall be situate, upon such person, or his known servant, proving to the satisfaction of

could not remove wine which he had sold, although he might have obtained a permit for so doing. [Mr. Justice *Park*.—The 10th section of the 26 Geo. 3. empowers auctioneers to sell wine by auction, on proof of the duty having been paid.] The only mode by which private indi-

1819.  
  
 TOUSSANT  
 v.  
 DARLAM.

the respective commissioners of Excise, or of the collector or supervisor of Excise, of the collection or district in which the place from whence such wine is intended to be removed is situate, that all the duties for such wine have been fully paid, and upon a request note in writing, made and sent or delivered to such officers of Excise, authorised to grant a permit thereupon, under and by virtue of that act, specifying the quantity of each sort of such foreign wine intended to be removed, and for the removal of which such permit is required; and if such wine be French wine, whether the same is French red wine, or French white wine; or in case such wine is not French wine, whether the same is foreign red wine, not French; or foreign white wine, not French; and also the number and contents of the casks, bottles, jars, or vessels containing the same; and, likewise, whether the same is to be removed by land or by water, and by what mode of conveyance such wine is intended to be sent, to give and grant, without fee or reward, a permit or permits in writing, signed by such officer or officers, expressing the quantity of such wine so to be removed, distinguishing in such permit such foreign wines from each other, according to the denominations thereof specified in such request note, according to the directions of this act; and expressing the name and names of the person or persons from whom the same is intended to be removed, and to whom the same is to be removed; and that the duty of such wine so intended to be removed has been paid, or that the same hath been condemned as forfeited, or was part of the stock of some dealer or dealers, or seller or sellers of foreign wines by wholesale, of which an account hath been delivered to the office of Excise, pursuant to this act. And all officers of Excise granting or giving such permit or permits, shall limit and express therein the time within which such wine, in such permit or permits mentioned, shall be removed from and out of the possession of the persons taking out such permit or permits; and also the time within which such wine shall be delivered and received into the possession of the person or persons, respectively, to whom the same is so permitted to be sent; and all such foreign wine which shall be removed under a description not conformable to this act, or under a

1819.

TOUISSANT  
v.  
DARLAM.

viduals can sell wine is by public auction. Executors and assignees may thus publicly dispose of the property of the deceased or bankrupt: but in this case the plaintiff had no licence, nor was the wine publicly sold; and as both he and the defendant were concerned in an illegal contract, he is not entitled to recover, although he has acted inadvertently and incautiously; both parties are, therefore, *in pari delicto*. He also submitted, that no suspicion could arise as to the defendant being privy to the transaction, as it appeared in evidence that the wine was changed by her foreman, or servant, without her knowledge.

Lord Chief Justice DALLAS.—I am clearly of opinion that, under the circumstances of this case, the plaintiff is entitled to recover. When the wine was imported it was regularly taken on the quay, and a respectable wine-merchant proved that the plaintiff purchased it and paid the duties. There was, therefore, no intention on his part to defraud the revenue. It was proposed, after its removal to *Hampstead*, that a friend of the plaintiff, residing in town, should take part of it. The defendant was not only employed by the plaintiff to remove it from one place to the other, but she also undertook to procure a proper permit for that purpose. Besides, there was no evidence to shew that the plaintiff had sold this wine, but merely that he had entrusted the defendant to convey it. It was further proved, that the same wine was received by the defendant's servants, as the plaintiff had

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false description, together with the casks, bottles, jars, vessels, and other packages containing the same, and the horses, cattle, carts, boats, barges, and other carriages used in the removal or carriage thereof, shall be forfeited and lost, and shall and may be seized by any officer or officers of the Excise.

purchased, and that it was in her custody alone until it was delivered in *London*; and that her foreman had changed it during the time it remained at her house. When the plaintiff tasted the wine which was substituted, he discovered the fraud, and the former part which had been duly delivered corresponded with the wine which he had sent; but the twelve dozen in question was not only adulterated, but absolutely pernicious and unwholesome. The defendant had nothing to do with the purchase, or the terms on which the wine was disposed of. The wine in question was delayed by some pretext nearly two hours on the road, when it was said that it was too late to deliver it that evening, when it was deposited at the defendant's house, and there changed. I am, therefore, surprised that the defendant should have ventured to make this application to the Court.

1819.  
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 TOUISSANT
 v.
 DARLAM.

Mr. Justice PARK.—I am of the same opinion. There is not even a colourable pretence to set aside this verdict. Supposing a gentleman has a quantity of excellent wine in his cellar, and he wishes to make a present to his friend, and for that purpose employs a person to carry it; if such person misuse or change it, is he not liable to an action, and what defence could be set up, unless the wine had been actually seized by an excise officer? But it did not appear in evidence that this wine was sold; and if it were a gift, it might be legally removed.

Mr. Justice BURROUGH.—This wine was not seized; and I therefore think that the Excise laws are entirely out of the question.

Mr. Justice RICHARDSON.—It has been admitted that a gift of wine is lawful. It does not appear here that

1819.
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 TOUISSANT  
 v.  
 DARLAM.

this was an illegal transfer. Besides, the plaintiff had purchased the wine, and paid the duties claimed by the Excise for it, before he entered into any contract with the defendant for its removal.

Rule refused (a).

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(a) See *Hodgson v. Temple*, 1 Marsh. 5. S. C. 5 Taunt. 181.

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Saturday,  
 May 1.

MALCOLM v. RAY.

The Court will not grant an attachment against a witness for disobedience to a subpoena, unless the affidavit state that he was duly called at the trial.

MR. Serjt. *Frere* on the first day of this term moved for an attachment against one of the defendant's witnesses in this cause, for not obeying a subpoena. It appeared, by affidavit, that the witness was in Court at the trial; and hearing the plaintiff's counsel, in his address to the jury, state, that the plaintiff must be nonsuited without his testimony, he immediately left the Court, and has not since been heard of. But as the affidavit did not state that the witness was called on his subpoena, the Court thought it insufficient, and ordered it to be amended in that respect; although the clerk of the Court had indorsed on the subpoena that the witness had been duly called. On this day an amended affidavit was produced, which stated that the witness was duly called on his subpoena at the trial, when the Court

Allowed the attachment.

GODSON Gent., one, &c. v. HOME.

Saturday,  
May 1.

THIS was an action for a libel, and tried before Mr. Justice *Richardson*, at the last assizes at *Worcester*.—The plaintiff is an attorney, and was employed by a person called *Nash* to bring an action against the executors of one *Wilden*. The defendant was commissioned to adjust and settle the executors' accounts, and on hearing that an action was about to be commenced, he wrote *Nash* the following letter, to warn him of the consequences :

" Sir,

" To my great astonishment, Mr. *Giles*, (one of the executors of the late Mr. *Wilden*) informs me that you have employed Mr. *Stephen Godson*, of *Worcester*, to trouble him for the debt due to you from the estate of Mr. *Wilden* : and as I much respect you, I would wish you to well consider what you are doing, as Mr. *Giles* has employed an attorney to give an appearance to the copy of a writ served upon him, that now must come to trial, and you should understand that you have no power to take such proceedings against an executor within the death year, consequently you will find to your sorrow, that you will be cast, and the law charges will very greatly lessen your money, without any advantage to you, but will, on the other hand, make you appear very troublesome. If you will be misled by an attorney,

The plaintiff, an attorney, was employed by *A.* to bring an action against *B.* The defendant was commissioned to adjust *B.*'s accounts, and finding that an action was about to be commenced against *B.* by the plaintiff, wrote a letter to *A.* blaming him for allowing the plaintiff to sue, and concluded by saying, " if you will be misled by an attorney who only considers his own interest, you will have to repent it: you may think when you have once ordered your attorney to write to *B.* he would not do any more

without your further orders, but if you once set him about it, he will go to any length without further orders."—In an action for a libel:—*Held*, that it was properly left to the jury whether this letter applied to the plaintiff individually, or to the profession at large, and that it was unnecessary to direct them to find whether it were a confidential or malicious communication.

1819.  
GODSON  
v.  
HOME.

who only considers his own interest, you will have to repent it: you may think when you have once ordered your attorney to write to Mr. *Giles*, he would not do any more without your further orders, but if you once set him about it, he will go to any length without further orders; and you must observe, that it will not be any expense to Mr. *Giles*, as Mr. *Wilden's* effects must bear him harmless. Therefore, as a friend and well wisher to you, I would advise you to shew this letter to your master, or some other well informed friend, who has no interest in advising you to go to law, and I am well satisfied they will agree with me, that you do immediately pay off your lawyer, and patiently wait for your money till the death year is up, at which time you will be paid with free interest, as there is no probability of your losing it or any part: Therefore take this wholesome advice from your sincere friend."

Signed by the defendant.

The learned Judge was of opinion that the defendant was not authorised to write such a letter, and left it to the jury to consider whether the expressions contained therein alluded to the plaintiff in particular, or to professional men generally. They thought it was intended to apply to the plaintiff individually, and accordingly found a verdict for him, damages 1s. Leave, however, was given to move to set it aside.

Mr. Serjt. *Copley* now moved accordingly, that a nonsuit might be entered, or a new trial granted. He submitted that this letter was a confidential communication; and, therefore, within the case of *M'Dougall v. Claridge (a)*, or if it were not so, that it ought to have

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(a) 1 Camp. 267.

been left to the jury, and that they should say whether it were a confidential communication, or intended to vilify the plaintiff. He also referred to *Cleaver v. Sarraude* (a), where, in an action similar to the preceding case, the plaintiff was nonsuited; as the Judge who tried that cause considered that the defendant had been acting *bonâ fide*. That, at all events, the letter here was equivocal on the face of it, as an attorney might relate to the profession generally; but that the main question was whether it were confidential or malicious.

1819.  
  
 GODSON  
 v.  
 HOME.

Lord Chief Justice DALLAS.—The jury, by their verdict, have found that the letter in question was written with a malicious intent; and I cannot say that I think its contents were merely confidential, for it comprises a general reflection on the professional character of the plaintiff. Besides, the defendant desired *Nash* to shew it to others. I therefore am of opinion that this case was properly disposed of by the jury.

Mr. Justice PARK and Mr. Justice BURROUGH concurred.

Mr. Justice RICHARDSON.—The only question I submitted to the jury was, whether this letter applied to the plaintiff individually or to the profession at large. The point was not made at the trial, whether this were

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(a) 1 Camp. 268, n. See also *Dunner v. Rigg*, *ib.* 269, n., where Lord *Ellenborough*, in a case similar to the present, refused to nonsuit the plaintiff, and left it for the jury to say whether the expressions complained of were used with a malicious intention of degrading the plaintiff, or with good faith to communicate facts to the person to whom the letter was written, which he was interested to know.



1819.  
 GODSON  
 v.  
 HOME.

a confidential communication or not, and if it had been, I do not think that it should necessarily have been left to the jury.

Rule refused.

Saturday,  
 May 1.

PARKER v. BARKER.

An acknowledgment by a person that he was in partnership with another as a trader, who afterwards became bankrupt, is sufficient to constitute a trading within the meaning of the bankrupt laws; although no acts of buying or selling were proved to have taken place during the partnership.

THIS was an action for money had and received, and brought by the order of the Vice Chancellor, to try whether the plaintiff had been a trader within the meaning of the bankrupt laws; and by the issue, the defendant was directed to admit that he had received £5., for the use of the plaintiff, in order to raise the question. At the trial of the cause, before Mr. Baron Wood, at the last assizes at Lancaster, the facts appeared to be these:

The plaintiff, who had lately become of age, had resided with a person by the name of *Greenwood*, who was a trader, and who had persuaded him to enter into a partnership, when he, *Greenwood*, was actually in a state of insolvency. During his insolvency a negotiation for a partnership took place, and it was publicly talked of to *Greenwood's* creditors. The plaintiff, himself, had told some persons that he was about to enter into a partnership with *Greenwood*, and mentioned to others that he had actually become a partner, and was in trade with him. This was about the month of *March*, 1816; but there was no evidence of any agreement of a partnership between the plaintiff and *Greenwood*, but merely these acknowledgments of the former, and his speaking of goods as being their joint property; and, in one instance, his

having given orders to some dyers as to the mode of dressing some cloths which had been left with them for that purpose. A commission of bankruptcy issued against *Greenwood* on the 9th of *May*, 1816. No evidence was adduced at the trial to shew that any sales had been effected by the plaintiff; but some consignments had been made on the partnership account.—On the plaintiff's case being closed, it was submitted that it was incumbent on him to shew an actual trading between the time he became partner with *Greenwood*, and the date of the commission against the latter; and that his merely having said that he was in partnership with *Greenwood* was not sufficient:—The learned Judge, however, thought that there was sufficient evidence to go to the jury, whether these acknowledgments of the plaintiff were sufficient to constitute him a trader, as being in partnership with *Greenwood*, and they found that he became partner with him on the 29d of *March*, 1816; and, accordingly, gave a verdict for the defendant.

1819.  
PARKER  
v.  
BARKER.

Mr. Serjt. *Cross* now moved for a rule *nisi*, that this verdict might be set aside, and a new trial granted; and submitted that the acknowledgments made by the plaintiff were not sufficient to constitute a trading, and that although the consignments might afford presumptive evidence of his buying, still that there was no proof of selling, either on his own account, or as a partner with *Greenwood*; at all events there was no direct proof of buying; and that, therefore, the trading had not been sufficiently made out.

Lord Chief Justice DALLAS.—This was not only a fit question for a jury, but I think they have decided very properly. *Greenwood* being in trade, and in embarrassed circumstances, prevailed on the plaintiff to enter into

1819.  
PARKER  
v.  
BARKER.

partnership with him. The plaintiff, himself, made frequent acknowledgments of the existence of such a partnership, and went with *Greenwood* to the dyers to give directions as to the mode of dying some goods. The jury found that the partnership commenced on the 23d of *March*, 1816, and that *Greenwood* became bankrupt on the 9th of *May* following. It is therefore fair to presume that the partnership continued from the former period until the time of the issuing of the commission. All the evidence adduced was in favour of the defendant. It was proved that the plaintiff acknowledged a general dealing with himself and *Greenwood*, and his conduct throughout, shewed that he was connected with *Greenwood* for the purpose of trading.

Mr. Justice PARK.—This was, in every respect, a fit question for a jury. I think that under the circumstances they have drawn a right conclusion; and, consequently, that their verdict ought not to be disturbed.

Mr. Justice BURROUGH.—*Greenwood* was in trade previous to the commencement of the partnership, and the plaintiff, by his subsequent conduct, adopted it.

Mr. Justice RICHARDSON.—I think the plaintiff has admitted himself to be a trader by his own acts.

Rule refused.

Doe on the demise of *PITCHER v. MITCHELL*.Saturday,  
May 1.

THIS was an action of ejectment, which came on to be tried before Mr. Justice *Burrough* at the last assizes at *Warwick*, when the defendant insisted that the lessor of the plaintiff was not entitled to recover possession, as he held under such lessor, as one of two tenants in common, who had made an application for rent, and distrained on the defendant in his own name, and that he had paid the amount to him alone. It appeared that on the 24th of *September*, 1817, the lessor of the plaintiff had given the defendant a notice to quit at Lady-day following: That, previous to such notice, the lessor had agreed with his co-tenant to make a division of the property, and that the former had taken the premises in question as his portion; but that the deeds for the partition of the property had not been executed.—The learned Judge, however, thought that the lessor of the plaintiff had a right to recover, as the defendant had paid the whole rent to him under the distress, which was, in fact, an attornment, and the jury found their verdict accordingly.

An action of ejectment is maintainable by one of two tenants in common, who had agreed to divide their property, if after such agreement, the defendant, who held under both as occupier, pay rent under a distress to such co-tenant alone; and it is no defence to such action that the deeds of partition between the co-tenants had not been executed.

Mr. Serjt. *Copley* now moved that this verdict might be set aside, and a nonsuit entered, and insisted that although the defendant had paid the rent to one of two tenants in common, yet it did not amount to an attornment; and that, as he originally held under both, that the plaintiff alone was not entitled to recover in this action, until the deeds of partition had been actually executed between him and his co-tenant.

1819.  
Doe  
v.  
MITCHELL.

Lord Chief Justice DALLAS.—The lessor of the plaintiff was originally one of two tenants in common. The property was afterwards divided, and the premises in question were agreed to be allotted to him as his share. It was objected, that he, alone, was not entitled to recover, as the deeds of partition had not been executed between him and his co-tenant. But the defendant himself admitted that he held this part of the property under the lessor alone, by having paid him the rent due under the distress. He, therefore, cannot now controvert the title of the lessor, or set up as a defence to this action that the deeds for the division of the property had not been executed between him and the other tenant in common.

Mr. Justice PARK and Mr. Justice RICHARDSON concurred.

Mr. Justice BURROUGH.—When the plaintiff gave a notice to quit to the defendant, he was, in fact, seised of the whole of the premises in question, and for which this action was brought, for the property of the co-tenants had been agreed to be previously divided. I therefore thought the notice to quit by the lessor alone, and the whole of the subsequent proceedings, to be good and regular. Besides, the defendant had admitted the lessor of the plaintiff to be sole owner, as he had made a treaty for the purchase of some timber with him alone, subsequently to the receipt of the notice to quit.

Rule refused.

## CARPENTER v. WHITE.

Tuesday,  
May 4.

THIS was an action of *assumpsit* brought by the plaintiff, as indorsee of a bill of exchange, against the defendant, as acceptor. The defendant pleaded the general issue of *non-assumpsit*.

At the trial of the cause before Mr. Justice *Richardson* at *Guildhall*, at the first sittings in this term, the plaintiff having proved his case, the defence relied on was that the defendant had been discharged under the permanent insolvent debtors' act (*a*), and that the plaintiff had told him, in the presence of two witnesses, previously to such discharge, not to include his debt (the bill in question) in the schedule, as he would never call on him for its amount. This was satisfactorily proved by the testimony of both these witnesses. In order to prove the discharge, a paper was given in evidence purporting to be a copy of the original discharge in the book kept for that purpose in the Insolvent Court, and signed *R. W. Clarkson*, who was the proper officer of that Court to sign such an instrument, and the impression of the seal of the Court was affixed on the margin:—it was proved that the signature of *Clarkson* was not in his own hand-writing, but that of his clerk; and it did not appear that the instrument in question was an attested copy, or that it had been examined with the original;—when it was objected, for the plaintiff, that this paper was not sufficient evidence of a discharge, under the 24th section

If a creditor, previously to the discharge of an insolvent debtor, request him not to include his debt in the schedule, as he would never call on him for its amount,—

*Held*, that if it be omitted in the schedule the creditor cannot afterwards sue the insolvent for such debt, and it is not necessary to produce a copy of such schedule at the trial.

A paper, purporting to be a copy of the original discharge of an insolvent, and signed by the clerk of the proper officer of that court, with the impression of the seal affixed to it, is admissible in evidence to prove such discharge,

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(a) 53 Geo 3, c. 102.

charge, without the production of the certificate thereof, or proof of its being an examined or attested copy.

1819.

CARPENTER  
v.  
WHITE.

of the 53 Geo. 3. c. 102. (a), and that a copy of such discharge ought not to be received, or that, at all events, the defendant could not give his discharge in evidence under the general issue, but that it should have been pleaded specially, when it would have been necessary to produce the certificate of the discharge by the clerk of the Insolvent Court. It was further objected that although the defendant had proved that the plaintiff had told him, previously to his discharge, not to include his debt in the schedule, as he would never call on him for it, still that it was necessary, that the schedule should have been produced at the trial, in order to ascertain whether such debt were included or not; and as such schedule was not produced, the promise of the plaintiff amounted merely to a *nudum pactum*, as his debt might be included therein. But the learned Judge thought that the paper in question was admissible as evidence of the defendant's discharge, without pleading it specially, and held that if a creditor were to say to his debtor, "You need not put my name in your schedule," in consequence of which the debtor omitted it, and the creditor was afterwards to sue him, relying that his debt was not inserted in the schedule amongst those from which the insolvent

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(a) By which it is enacted, "That the proper officer of the Court to be established by virtue of that act, shall, on the reasonable request of a prisoner, or of any creditor of such prisoner, or his attorney, produce and shew to such prisoner, creditor, or attorney, at such times as that Court shall direct, such petition, schedule, oath, order, and judgment, and all other orders and proceedings made and had in such matter; and that a true copy of every such petition, schedule, oath, order, judgment, and other proceedings, signed by the officer in whose custody the same shall be, or his deputy, certifying the same to be a true copy of such petition, schedule, order, judgment, or other proceeding, as the case may be, without being written on stamped paper, shall, at all times, be admitted in all Courts whatever as legal evidence of the same respectively."

was discharged, it would not only be a fraud on the insolvent, but bar the *bonâ fide* creditors from their right to recover.—A verdict was consequently found for the defendant, with liberty to the plaintiff to move that a verdict might be entered for him in case the Court should be of opinion that the instrument produced ought not to have been admitted as evidence of the defendant's discharge.

1819.  
  
 CARPENTER  
 v.  
 WHITE.

Mr. Serjt. *Onslow* now moved accordingly, and recapitulated the objections raised at the trial.

Lord Chief Justice DALLAS.—The defendant being about to take the benefit of the general insolvent debtors' act, the plaintiff allowed him to omit his debt in the schedule; it was therefore unnecessary for him to enlarge the amount of such schedule by inserting the bill in question, being the amount of the plaintiff's debt. If the sum due to the plaintiff were omitted, and the defendant was discharged from all the other debts contained in his schedule, the plaintiff cannot now turn round and demand the amount of this bill, on the ground that his name was not inserted in such schedule as a creditor. It has been objected that the defendant's discharge has not been duly proved, and that it was necessary to produce the certificate of such discharge: but the document which was given in evidence at the trial for this purpose was obtained at Mr. *Clarkson's* office, who was the proper officer of the insolvent debtors' court, and purported to be a copy of such discharge. This paper was given by Mr. *Clarkson's* acting clerk, (he not being in the way when it was applied for), who signed his name for Mr. *Clarkson*, and affixed to it the seal of the office. This, therefore, was a sufficient compliance with the 24th section of the 53 Geo. 3. c. 102. No



1819.  
CARPENTER  
v.  
WHITE.

objection was made at the trial as to the signature of the clerk, but merely that an attested or examined copy should have been produced. The clerk was, to all intents and purposes, Mr. *Clarkson's* deputy, and duly authorized by him to sign instruments of this description in his name. Another objection has been raised, namely that the promise made by the plaintiff, that he would not call on the defendant for the debt, and therefore that he need not insert his name in the schedule, was of no avail, as the defendant had not produced a copy of the schedule at the trial. If the plaintiff's name were not inserted in the schedule, the defendant had a good defence to this action; but even if the schedule had been produced, and the plaintiff's name found in it, still the plaintiff would be barred from recovering by the statute; for, taking all the evidence together, the plaintiff himself admitted, in the presence of two witnesses, that he did not consider the bill in question as a debt. The defendant, in fact, accepted it without consideration. The plaintiff therefore told him his name might be omitted; as, if it were inserted in the schedule, it might tend to swell his other debts, and have a prejudicial effect on the minds of his other creditors. It seems to me, therefore, that the defendant could not be charged by the plaintiff; and I am further of opinion that the copy of the discharge was, under the circumstances, admissible in evidence, as the requisites of the 24th section of the 53 *Geo. 3. c. 102.* had been fully complied with.

Mr. Justice PARK concurred.

Mr. Justice BURROUGH.—The plaintiff himself agreed to abandon this debt, and I think the whole of the evidence offered at the trial might be given under the general issue. Independent of this, parol evidence was

adduced to prove that the plaintiff had consented to relinquish his claim on the defendant, as to the bill in question. This therefore was a complete answer to the action. This was not merely a conditional promise, but the plaintiff has so completely bound himself by such promise as if no debt had ever existed; and there have been many cases where the parties themselves have admitted that they had no cause of action.

1619.  
 CARPENTER  
 v.  
 WHITE.

Mr. Justice RICHARDSON.—I thought, at the trial, that the copy of the defendant's discharge was admissible in evidence, as by the 24th section of the 53 Geo. 3. c. 102. the proper officer of the Insolvent Debtors' Court is required to produce all the orders and proceedings of that Court, and it was thereby enacted that a true copy of such proceedings, signed by the officer in whose custody the same should be, or his deputy, certifying the same to be a true copy of such proceedings, should be admitted in all Courts whatever as legal evidence of the same respectively without being written on stamped paper. I therefore at the trial considered that these requisites had been fully complied with, and that Mr. *Clarkson's* clerk was empowered to sign the document in question in his name, and affix the seal of the Court to it; and, under the circumstances, I did not think an examined copy requisite. As to the other points, I entirely concur with my Lord Chief Justice.

Rule refused.

Wednesday,  
May 5.

WOOD and others v. STEPHENS, a prisoner.

If a declaration against a prisoner in custody be delivered on the last day of the term in which the writ is returnable, the affidavit of the delivery need not be filed till twenty days after the expiration of the following term.

If the month be omitted in the jurat of such affidavit it is defective, and cannot be amended.

Mr. Serjt. *Vaughan* on a former day in this term had obtained a rule *nisi* that the defendant should be discharged out of the custody of the warden of the *Fleet*, on his entering a common appearance, and that the interlocutory judgment, and the subsequent proceedings thereon, might be set aside; on an affidavit of the defendant, which stated that the declaration was delivered on the 28th of *November* last, being the last day of *Michaelmas* term, and in which the writ was returnable, but that no affidavit of the delivery of the declaration was filed until the 27th of *January* last: that interlocutory judgment had been signed on the 9th of *February* following, for want of a plea; that it was his intention to have pleaded to the declaration, and that he has been advised that he has a good defence to the action. It also appeared that the affidavit of the delivery of the declaration was defective, as no month was mentioned in the jurat.—The learned Serjeant therefore submitted that the defendant was entitled to his discharge, as the affidavit of the delivery of the copy of the declaration should have been filed with one of the secondaries of this Court, before the end of twenty days after the term in which the process was returnable, in compliance with the rule 5 *William and Mary* (a); and that, although the plaintiffs might have had the whole of the term after which the writ was returnable to file their declaration, still, as they had delivered such declaration within the first term, they were bound to file the affidavit within twenty days

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(a) *Easter, 5 W. & M. reg. 3. s. 6.*

after its delivery. He also insisted that the defect in the affidavit was fatal, and now too late to be amended.

1819.  
WOOD  
v.  
STEPHENS.

Mr. Serjt. *Copley* this day shewed cause on an affidavit which stated that the action was brought against the defendant as acceptor of a bill of exchange, and that he had no good defence to such action. He observed, that the defendant's affidavit did not assign any reason for his not having pleaded, and submitted that it was unnecessary to file the affidavit of service of the declaration within twenty days from the day on which it was delivered, as the plaintiffs had till the end of last *Hilary* term for that purpose.

The Court were decidedly of opinion that the affidavit need not have been filed till twenty days from the end of *Hilary* term; but as the defect in the jurat was fatal, and too late to be amended, they made the rule

Absolute without costs.

BRACEBRIDGE v. JOHNSTON.

• Wednesday,  
May 5.

Mr. Serjt. *Blosset* on a former day in this term had obtained a rule *nisi* that the writ of *capias ad respondendum* issued in this cause might be quashed, and the subsequent proceedings set aside, on the ground of irregularity. The writ, which was a serviceable *capias*, and served in the county palatine of *Chester*, was directed

A writ of *capias ad respondendum*, directed to the chamberlain of *Chester*, commanding him to take the defendant, is irregular and

void; as he is only empowered to issue his mandate to the sheriff for that purpose.

1819.  
BRACEBRIDGE  
v.  
JOHNSTON.

"To our Chamberlain of our county palatine of *Chester*, or his deputy there, commanding him or his deputy to take the defendant and *Job Doe*, if they should be found, &c., and them safely keep, so that they might have their bodies before our Justices at *Westminster*, in eight days of the Purification. The writ should have been directed to the Chamberlain of *Chester* or his deputy there, commanding them by that writ under the seal of the county palatine to be duly made, and to be directed to the sheriff of the said county palatine, they, the said Chamberlain or his deputy, should command the same sheriff to take the defendant and *Job Doe*.—The learned Serjeant therefore submitted that the Chamberlain had no authority to take the defendant, and that the sheriff alone was the proper officer for that purpose.

Mr. Serjt. *Lens* now shewed cause, and admitted that the writ was informal, as it had omitted the mandate from the Chamberlain to the sheriff. The only question was, whether the parties themselves could take notice of such informality. There was clearly no irregularity between them:—the defendant did not suffer by this informality. It was immaterial, as to him, whether the writ was served by the Chamberlain or the sheriff. He had equal notice in the one case as the other; and if he were served by the former it was advantageous to him, because it was a less expensive mode of proceeding. In the case of *Jackson v. Hunter* (a) the question was different from the present, as the writ was there directed to the sheriff; and Lord *Kenyon* drew the distinction as to informality or irregularity between the original parties and the defendant in the suit; for he said, that "it seemed to him that the writ was not absolutely void, but merely in-

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(a) 6 T. R. 71.

formal, and that, with respect to the defendant in the original suit, no injury was done to him;" and he further added, "that it was not necessary to determine whether the defendant in the original cause could or could not have set aside the process for irregularity by motion; for even if he could, it is a mere irregularity; but every irregularity is not erroneous." So here, the writ was informal as between the other parties, but not irregular as to the defendant; for even if the Chamberlain had served the writ, he would have no cause to complain.

1819.  
  
 BRACKENRIDGE  
 v.  
 JOHNSTON.

Lord Chief Justice DALLAS.—My brother *Lens* has admitted that this writ was informal. The only question then is, whether it be irregular. This case differs very materially from that of *Jackson v. Hunter*, for here there was an irregularity in the writ itself, as it commanded the Chamberlain to take the defendant, who was only authorised to issue his mandate to the sheriff for that purpose.

Mr. Justice PARK.—This case is altogether different from that of *Jackson v. Hunter*, for the person to whom the writ was directed had no authority to take the defendant, and the writ is consequently void.

Mr. Justice BURROUGH.—The writ was clearly irregular, as between the original parties, and I therefore think it must be considered as a nullity.

Mr. Justice RICHARDSON concurred.

Rule absolute.

Thursday,  
May 6.

HODGES v. MEEK.

If added bail be excepted to, on the ground that the original bail were attorney's clerks, the Court will give time to put in and justify fresh bail.

Mr. Serjt. *Vaughan* excepted to the added bail in this cause, upon the principle that both the former bail were attorney's clerks, who were therefore to be considered as a nullity; and he contended that no addition could be made to a nullity, and that consequently fresh bail must be put in.

Mr. Serjt. *Lawes*, *contra*, insisted, that although the former bail were attorney's clerks, still that they were not to be considered as a nullity, as they might be good bail for the purpose of rendering their principal, and that they were merely incompetent to justify in the present instance.

The Court gave two days time to put in and justify fresh bail (*a*).

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(a) See the case of *Bell v. Gate*, 1 Taunt. 163, where Mr. Justice *Heath* is reported to have said, that "it was once held, that after bail had been rejected, they could not surrender their principal; but that it was then held that they might enter into a new recognizance for the purpose of making the render, and that any persons whatsoever might become bail for that purpose." See also the cases of *Richie v. Gilbert*, and *Cakish v. Ross*, 1 Taunt. 164. *notis*.

DE WARRE, plaintiff, BRYAN, deforciant.

Thursday,  
May 6.

MR. Serjt. *Hullock*, on a former day, moved that this fine, which was passed in *Hilary* term last, might be amended by substituting the Christian name of *John* for *George*, on affidavits by the attornies for both the vendor and vendee, that the word *George* was written by mistake for *John*, in the *præcipe*, concord, and fine itself, and that the real name of the deforciant was *John*. On the production of the deed to lead the uses, it appeared, that throughout the whole of the body of it the word *John* was written on an erasure, but it was signed by the deforciant in his right name of *John*. The Court required a further affidavit, to shew when the erasures took place in the body of the deed, and whether they were made previous to its execution. The learned Serjeant now read an affidavit, which stated that the deforciant was present at the execution of the deed in question, and that the word *John* having been inserted throughout the body of it by mistake for *George*, the latter word was written on an erasure before the execution of the deed by either of the parties.

If a wrong Christian name of one of the parties to a fine be inserted by mistake, and the right one written on an erasure in the deed to lead the uses, the Court will require an affidavit, to shew that such erasure was made, and the name written thereon, before the deed was executed, although the party had signed his right name at the foot of such deed.

*Fiat.*

GORDON and others v. MITCHELL and others.

Friday,  
May 7.

MR. Serjt. *Pell* moved for a rule *nisi*, that an award which had been made in this case might be set aside,

If the terms of an award be clear upon the face of it, the

Court will not admit an affidavit of one of the arbitrators to explain their intention.



1819:  
GORDON  
v.  
MITCHELL.

on the ground that its effect, as to the payment of a sum of money from the defendants to the plaintiffs, was uncertain, as it appeared on the face of the award. It was made under the following circumstances:

The plaintiffs and defendants had entered into articles of agreement, and the former, at the execution thereof, were in possession of certain licences to trade to *Vera Cruz*, which they represented to the defendants as being valuable instruments. The defendants, being desirous of becoming the proprietors of one of those licences, as the plaintiffs had assured them that goods shipped under them would find a profitable market at *Vera Cruz*, accordingly purchased one of them, subject to a payment of certain duties, at the rate of fifteen per cent. on the outward, and five per cent. on the homeward cargo. They freighted a vessel, and on her arrival at *Vera Cruz* it was discovered that the state of the market was wholly different from the representation which had been made by the plaintiffs. Disputes then arose between the parties, which were ultimately referred to two arbitrators, and which formed the subject of the present award. The defendants, according to the stipulations contained in the agreement, paid considerable sums of money for the duties on the outward and homeward cargoes, which, at the time of making the award, remained in the hands of the Spanish government. From those duties deductions were ultimately to be made, except as to the fifteen and five per cent. on the outward and homeward cargoes.

The arbitrators awarded that the defendants should pay to the plaintiffs the sum of £9,234, on a given day, and stated, that whereas the defendants had paid duties to certain persons in *Spain*, duly authorized to receive the same, amounting to 43,821 dollars for the outward, and 15,893 dollars for the homeward cargo, and that the whole or part of these two sums might be restored

or released to the defendants, they ordered and directed that whatever part of these two sums might be so paid on account of the export and import duties, and restored to the defendants, should be paid by them to the plaintiffs, and that the costs of the restoration should be borne and paid by the latter.

1819.  
GORDON  
v.  
MITCHELL.

The learned Serjeant submitted, that on the construction of this part of the award the defendants might not be made answerable for the acts of their agents at *Vera Cruz*, and that it was doubtful whether the defendants would be liable to the plaintiffs for these duties, if they were recovered from the Spanish government by such agents, and not transmitted to them. He observed, that it was the intention of the arbitrators that the defendants should be liable at all events, and was about to read an affidavit of one of such arbitrators to explain their intention.—But,

The Court held, that if the terms of an award be clear upon the face of it, they would not admit an affidavit of one of the arbitrators to explain their intention. That they had expressly awarded that all sums which might be received by the defendants should be paid over to the plaintiffs, and that the award was in itself so clear, that no other evidence could be admitted to raise a doubt.

Rule refused.

Friday,  
May 7.

PHILPOTTS and WIFE v. REED.

The Court will not discharge a defendant, on entering a common appearance, on the ground of his having become insolvent, and obtained his certificate at *Newfoundland*, under the 49 Geo. 3. c. 27. s. 8. but will leave him to plead such certificate in bar.

Mr. Serjt. *Copley*, on a former day in this term, had obtained a rule *nisi*, that the bail-bond given in this case might be delivered up to be cancelled, on the defendant's entering a common appearance, on affidavits which stated that the original cause of action arose at *Newfoundland* in the year 1815. That the defendant carried on business there as a trader, and that, in 1818, he became insolvent, and subsequently obtained his certificate in that island, under the 49 Geo. 3. c. 27. s. 8 (a), which certificate was duly proved; and that in *March* last he was arrested in this country for a debt contracted before his discharge at *Newfoundland* under that statute. He therefore insisted that the defendant was now entitled to be discharged on filing common bail, and observed that the 31 Geo. 3. c. 29—32 Geo. 3. c. 46, and 33 Geo. 3. c. 76, were passed to regulate the jurisdiction of *Newfoundland*, and that such jurisdiction was enlarged by the 49 Geo. 3. c. 27.

Mr. Serjt. *Lens* now shewed cause, and submitted, that the defendant was not entitled to his discharge, as the 8th section of the 49 Geo. 3. c. 27. did not extend to the provision contained in the 5 Geo. 2. c. 30. sec. 7, which, in an ordinary case of bankruptcy, allowed a bankrupt to be discharged upon this summary mode of applica-

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(a) By which it is enacted, that "If the insolvent shall disclose all his effects, and conform to the orders of the Court of Judicature in the island of *Newfoundland*, that Court should, with the consent of one half in number and value of his creditors, certify the same; and such certificate, when pleaded, should be a bar to all suits and complaints for debts contracted within the island of *Newfoundland*, and on the islands and seas, in that act before described, and on the banks of *Newfoundland*, and in *Great Britain* or *Ireland* prior to the time when he was declared insolvent."

tion, if he were arrested, prosecuted, or impleaded upon any debt due before he became a bankrupt: that in the case of *Quin v. Keefe* (a), this Court refused to discharge out of custody a defendant holden to bail for a debt contracted in *England*, on a common appearance, on an affidavit of his having become a bankrupt in *Ireland*, and obtained his certificate there, but put him to plead; and Lord Chief Justice *Eyre* there said, "In cases of this sort the ground ought to be perfectly plain, where the Court is called on to interfere in a summary way: if there is the least doubt, the party must put the matter on record by pleading." And Mr. Justice *Buller* added, "It is enough to say against this motion that the point is new in this Court." As, therefore, the clause in the 49 *Geo. 3.* bears no resemblance, and is not co-extensive with the 5 *Geo. 2. c. 30. s. 7*, the defendant could only plead to the action, and the Court had no jurisdiction to relieve him by the means now sought for.

Mr. Serjt. *Cross*, for Mr. Serjt. *Copley*, in support of the rule submitted, that the 49 *Geo. 3. c. 27*, was similar in terms to the enactment contained in the 5 *Geo. 2. c. 30. s. 7*; and that, although the former did not contain any express or precise provision, yet, that as every advantage was afforded to a bankrupt by the latter statute, the defendant was entitled to his discharge, as the 49 *Geo. 3.* ought to receive a co-extensive and liberal construction. But,

The Court were decidedly of opinion, that the terms contained in the 8th section of the 49 *Geo. 3.* were wholly distinct from those of the 7th section of 5 *Geo. 2. c. 30.* and that the defendant, therefore, was not entitled to his discharge, but must plead his certificate.

Rule discharged.

1819.  
  
 PHILPOTTS  
 v.  
 REED.

Saturday,  
May 8.

DES ANGES, Knight, and another, v. PRIESTLEY.

In a declaration of covenant brought by a sheriff against a surety for one of his officers, who had not arrested a person under their warrant, it is necessary to aver that the warrant was delivered by the sheriff to such officer; and it seems that such warrant should have been directed to him.

THIS was an action of covenant brought by the plaintiffs, as late sheriff of *Middlesex*, against the defendant, as surety for one of their officers. The first count of the declaration stated, that by an indenture made between the plaintiffs, the then sheriff of *Middlesex*, of the one part, and one *Joseph Walmsley*, the defendant, and certain other persons, as sureties of *Walmsley*, of the other part; the plaintiffs, at the request of *Walmsley* and his sureties, and in consideration of the covenants in the indenture contained, nominated and appointed *Walmsley* to be one of their bailiffs, permitting him to receive all lawful fees usually received by sheriffs' bailiffs, but reserving to the sheriff, poundage, &c.—And that, in consideration of the premises, the defendant, *Walmsley*, and his sureties, covenanted to save harmless, and indemnify the plaintiffs against all actions, &c. which might be commenced or prosecuted against them by reason of the executing, not executing, returning, or non-return of any writ, or other process, by the act or default of *Walmsley*, as well as the not bringing into Court the body of any debtor arrested by him, or in his custody, as bailiff; or by reason of extortion, or any other cause, happening by the act or default of *Walmsley*, as their bailiff. The plaintiffs then averred the non-performance of this covenant by the defendant, and protested that, whilst *Walmsley* was bailiff, one *James Flude*, and one *Thomas Saville Flude*, sued out a bill of *Middlesex*, whereby the plaintiffs, as sheriff, were commanded to take one *Charles Thorogood*, if he should be found in his bailiwick, and him safely keep, so that he might have his body before our Lord the King, at *Westminster*, on *Friday* next, after fifteen days

of *St. Martin*, to answer the said *James Flude*, and *Thomas Saville Flude*, in a plea of trespass; and also to a bill to be exhibited by them against *Thorogood* for £80, upon promises, which precept was duly indorsed for bail for £40, and delivered to the sheriff, to be executed in due form of law. The plaintiffs then averred that they issued their warrant, under their seal, for taking the said *Thomas Thorogood*, which was delivered to *Walmsley*, to be executed in due form of law: That *Thorogood*, after the delivery of the warrant to *Walmsley*, was within the bailiwick of the plaintiffs, as sheriff, and could and might have been taken and arrested by *Walmsley*, under and by virtue of the said precept and warrant. Yet, that *Walmsley*, not regarding his duty as bailiff, did not take or arrest *Thorogood*: By means whereof the plaintiffs could not have his body before our Lord the King, at *Westminster*, as above they were commanded. That, therefore, *James Flude* and *Thomas Saville Flude* commenced an action against the plaintiffs for not arresting *Thorogood*, and recovered against them £106 damages; and that a writ of *feri facias* was issued against the plaintiffs, and execution levied thereon; and that the defendant had not saved harmless and indemnified the plaintiffs, according to his covenant in the said indenture above contained in that behalf.—The second count was similar to the first, except in stating that *Thorogood* was arrested and detained in the custody of *Walmsley*, who permitted him to escape.

The plaintiff pleaded, First, *non est factum*. Secondly, as to the 1st count of the declaration, that the warrant, made and issued under the seal of office of the sheriffs, was not directed to *Walmsley*. Thirdly, as to that count, that the warrant was not delivered to *Walmsley* to be executed. Fourthly, as to that count, that *Thorogood* could not, nor might have been taken or arrested by

1819.  
  
 DES ANGES  
 v.  
 PRIESTLEY.

1819.  
 DES ANGES  
 v.  
 PRIESTLEY.

*Walmsley*, as such bailiff, under the precept or warrant, in that first count mentioned. Fifthly, that the warrant, in the last count mentioned, was not directed to *Walmsley*. There were three other pleas to the last count, similar to those pleaded to the first. The plaintiffs added a *similiter* to the 1st, 3d, 4th, 6th, 7th, and 8th pleas, and demurred generally to the 2d and 5th. The defendant joined in demurrer.

The cause came on for argument this day, when Mr. Serjt. *Vaughan*, for the defendant, stated, that the only question was, whether it was not necessary for the plaintiffs to have averred in their declaration, that the warrant was directed to *Walmsley*, as their bailiff. He insisted that the mere statement of the delivery of the warrant was insufficient; and that, to make it a legal process, it was necessary for it to be directed as well as delivered. He relied on the cases of *Drake v. Sykes* (a), *Burslem v. Fern* (b), and *Howsin v. Barrow* (c), in which latter case the sheriff, having directed a warrant to *A.*, and all his other officers, to arrest *B.*, and *A.* afterwards inserted the name of *C.*: it was held that the warrant was illegal, and the arrest by *C.* void. He also cited *Lutwyche* (d), *Comyn's Digest* (e).

Mr. Serjt. *Hullock* was about to argue on behalf of the plaintiffs, when the Court suggested to him the propriety of amending the declaration, as it did not aver that the warrant was delivered to *Walmsley* by the plaintiffs as sheriff, but merely that it was delivered to him generally. To this the learned Serjeant consented, and the declaration was ordered to be

Amended on payment of costs.

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(a) 7 T. R. 113.—(b) 2 Wils. 47.—(c) 6 T. R. 122.  
 —(d) 1405.—(e) *Pleader*, 3. M. 24.

## WINDLE v. RICARDO.

Monday,  
May 10.

THIS was an action on the case, and brought to recover a compensation in damages for a false return made by the defendant, as sheriff of *Gloucester*, to a writ of right issued by and on the behalf of the plaintiff. The first count of the declaration stated that in *Hilary* term, 58 Geo. 3, the plaintiff demanded against *Elizabeth Baldwin*, widow, two messuages, &c. situate at *Mangotsfield*, in the county of *Gloucester*, which the plaintiff claimed to be his right and inheritance by writ of right. Whereupon the plaintiff said, that *Samuel Simmons Windle*, whose heir he, (the plaintiff) is, was seized of the tenements aforesaid, in his demesne as of fee and right, and that from the said *Samuel Simmons Windle* the right of the same tenements descended to the plaintiff, son and heir to the said *Samuel Simmons Windle*, which the plaintiff demanded, and that such was his right, he offered, &c. That the said *Elizabeth Baldwin* came and defended the right of the plaintiff, &c., and put herself upon the grand assize, and prayed recognition to be made, whether she had greater right to hold the tenements aforesaid to her and her heirs, as tenants thereof, or the plaintiff as he above demanded them, &c. Therefore the sheriff was commanded that he summon by good summoners, four lawful knights of his county, girt with swords, that they might be before his majesty's Justices at *Westminster*, in fifteen days of *Easter*, or before his said majesty's Justices assigned to take the assize in and for the said county of *Gloucester*, if they should first come on *Wednesday*, the first day of *April*, then next at *Gloucester*, there to take the assize in and for the said county of *Gloucester*, according to the form of the

To a writ of summons on a writ of right, the sheriff returned that he had caused four knights to be summoned. At the bottom of which, and before the return was made, the officer of the court had indorsed that they were duly sworn.—

*Held*, that such indorsement formed no part of the sheriff's return.—*Held*, also, that the sheriff, being commanded by the writ to summon such knights, was not guilty of negligence in omitting to have them sworn, nor was he bound to execute such writ before the commission day of the assizes, but might summon the knights from the grand jury when present at such assizes.



1819.  
WINDLE  
v.  
RICARDO.

statute in such case made and provided, to make election on their oaths of the grand assize aforesaid; and that he the said sheriff return to his said majesty's Justices of the Bench here, in fifteen days of *Easter* aforesaid, the names of the summoners of the knights so by him to be summoned, and of the persons who should be by them elected as aforesaid, together with that writ; that thereupon the plaintiff afterwards, to wit, on the 12th day of *February*, in the 58th year of the reign aforesaid, sued and prosecuted out of the Court of our said lord the king of the Bench aforesaid, at *Westminster* aforesaid, a certain writ of our lord the king, called a writ of summons, directed to the sheriff of *Gloucestershire*: "By which writ our lord the king commanded the said sheriff, that by good summoners he should summon four lawful knights of his county, girt with swords, that they should be before his said majesty's Justices at *Westminster*, in fifteen days of *Easter*, or before his said majesty's Justices assigned to take the assize, in and for the said sheriff's county, if they should first come on *Wednesday*, the first day of *April*, then next at *Gloucester*, there to take the assize in and for the said sheriff's county, according to the form of the statute in such case made and provided, to make election of the grand assize of our said lord the king, between the plaintiff, demandant, and *Elizabeth Baldwin*, widow, tenant, of two messuages, &c. with the appurtenances, in the parish of *Mangotsfield* aforesaid, in the said sheriff's county, whereof the said *Elizabeth Baldwin*, in the same Court had put herself upon the said grand assize, by praying recognition to be made, whether she had a greater title to hold the tenements aforesaid, with the appurtenances, to her and her heirs, as tenant thereof, as she then held the same, or whether the said plaintiff had title to hold

the said tenements, with the appurtenances, as he had demanded the same; and that the said sheriff should have there the names of the summoners of the knights so by him the said sheriff to be summoned, and of the persons who should be by them elected, and that writ:—"And which said writ afterwards, and before the return thereof, to wit, on the 17th day of *February*, in the year aforesaid, at *Cheltenham*, in the county of *Gloucester*, aforesaid, to wit, at *Westminster*, aforesaid, in the county of *Middlesex* aforesaid, was delivered to the defendant, who then and from thence, until and at and after the return thereof was sheriff of the said county of *Gloucester*, to be executed in due form of law; yet that the defendant, so being sheriff of the said county of *Gloucester*, as aforesaid, not regarding the duty of his office as such sheriff, but intending to injure the plaintiff, and to delay and hinder him in the prosecution of the said action, and to put him to great expense of his monies, did not nor would summon four lawful knights of the said last mentioned county, that they might be before his said majesty's Justices assigned to take the assize in and for the said county of *Gloucester* as aforesaid, and only summoned the said knights to be before his majesty's Justices at the day and place in the said writ of summons in that behalf mentioned; and although afterwards, to wit, on the first day of *April*, in the year aforesaid, the said assize in and for the said county was taken in manner aforesaid, at *Gloucester* aforesaid, the said four knights were not before the Justices so assigned as aforesaid, to make election of the said grand assize as aforesaid, and no election was made thereof; and the defendant, so being sheriff of the said county of *Gloucester*, further contriving and intending as aforesaid, afterwards at the return of the said writ, falsely and fraudulently returned to

1819.  
WINDLE  
v.  
RICARDO.


1819.  
 WINDLE  
 v.  
 RICARDO.

attended during a great part of the assize, but that when called on to make election of the grand assize, two only appeared, when an application was made to Mr. Justice *Park*, before whom the cause was to have been tried, for other knights to be summoned; but he said that the writ of summons could not be amended, and that the proceedings must stand over till the then next assizes. The return was made in court by the clerk to the under-sheriff, in expectation of the knights being in attendance when called on, and the memorandum was indorsed by the crier, in order to avoid delay in case they had been called on by the court. In consequence of this return being made, the present action was brought against the defendant. On these facts being proved, his Lordship was of opinion that the memorandum made by the crier formed no part of the sheriff's return, and that no negligence could be imputed to him as such: he, however, directed a verdict to be entered for the plaintiff generally, with liberty for the defendant to move that a verdict might be entered for him.

Mr. Serjt. *Lens*, on a former day in this term, having accordingly obtained a rule *nisi*, that this verdict should be set aside, and instead thereof a verdict entered for the defendant,

Mr. Serjt. *Vaughan* now shewed cause, and insisted that if the defendant were not liable for a false return, yet that the plaintiff was entitled to retain his verdict on the fifth count, which charged him with negligence in executing the summons: but the plaintiff was also entitled to recover on the evidence, for the defendant was directed by the writ to summon the knights on the 1st of *April*, and it was not put into the hands of the bailiff to be executed till the 2d, which was the day after the court

mission was opened. They should have been summoned previous to the commencement of the assizes. Although two of the knights did not appear when called on, no liability could attach to them, as they had not been duly summoned. As to the indorsement made by the crier, it is, in fact, a part of the return, for the sheriff has adopted it as such. His signature being affixed to the return above the indorsement makes no difference, for the whole of the writing on the back of the writ must be considered as the return. He should have returned according to the fact, *viz.* that although he had summoned four knights, two of them did not appear; at all events, the indorsement should have been cancelled before the writ was returned; but as it was not expunged, it must be taken as part of the return which is imperfect and bad.

1819.  
  
 WINDLE  
 v.  
 RICARDO.

Mr. Serjt. *Leas*, in support of the rule, was stopped by the Court.

Lord Chief Justice DALLAS.—I am of opinion that there is no ground whatever for this application; and on fully considering the facts of the case, I think it ought not to have been made. The action was brought against the defendant, as sheriff of *Gloucester*, for a false, and not an insufficient return. In order to entitle the plaintiff to damages therefore, the return itself must, of necessity, be false. It is proper, in the first place, to inquire what the defendant was commanded to do by the original writ of summons,—merely to cause four knights to be summoned; for after they had been summoned, it was no part of his duty to swear them either by himself or his officer. His duty therefore was discharged on summoning the knights to appear at the assizes. If he had returned that he had summoned

1819.  
 WINDLE  
 v.  
 RICARDO.

them, it would, of itself, have been sufficient, as the swearing them was no part of his duty; the indorsement by the officer of the Court therefore may be considered as immaterial. He has, in fact, not only returned that he had caused four knights to be summoned, but has actually done so:—This, therefore, was a good and sufficient return. The clerk to the undersheriff, who was in court, and expecting the attendance of the knights, indorsed the return on the back of the writ; and the officer of the Court also fully anticipating such attendance, subscribed the memorandum in question under the return. This memorandum, therefore, can be considered as no part of the sheriff's return. The indorsement is merely an immaterial addition, as it formed no part of the sheriff's duty. Although it stated that the knights had been sworn, still it did not add to the responsibility of the sheriff. As to the imputed negligence, the writ, at most, only commanded that four knights should be present at the assizes. They might be there selected from the grand jury. This would save the additional expense of sending the writ of summons into the country to be executed. It was therefore more prudent for the sheriff to defer serving it until the grand jury had assembled. It appears that four knights were summoned, and the sheriff consequently returned that he had caused them to be so. They all consented to appear, and were in actual attendance during a great part of the assizes. It cannot therefore be said that the sheriff is to be deemed responsible for their appearance. Instead of the defendant having been guilty of negligence, I think he took a very discreet and proper course.

Mr. Justice PARK.—I am extremely happy to add my express concurrence to the opinion of the Lord Chief

Justice, and think this was a vexatious action on the part of the plaintiff, either on the grounds of a false return, or the imputation of negligence to the defendant, as sheriff. He was not commanded, by the writ, to swear the knights, but only to summon them, and return the names of the summoners, and of the persons who should be by them elected: and the return was accordingly made in those express terms. Formerly, the Judge himself was supposed to be the party by whom the knights were to be sworn, and he signed an indorsement on the back of the writ, certifying to the Court above, that the knights were duly sworn at the assizes. The sheriff therefore has nothing to do with swearing them; and if any action were maintainable in this case, it should have been brought against the crier, who was the Judge's officer for this purpose. I was applied to at the trial to have two others sworn, in the room of those who were absent. They had both been on the grand jury, and had attended in court for the express purpose of making their election of the grand assize in this case; but as they were called on nearly at the end of the assizes, they had left the town and were gone home. I also think that the knights need not be summoned before the commencement of the assizes, and that this ground of objection is also untenable; and as they were not only summoned, but in attendance, that this rule must be made absolute.

Mr. Justice BURROUGH.—The sheriff's return was complete when his signature was affixed to it at the back of the writ. The memorandum which was afterwards indorsed by the crier, forms no part of the return, and may therefore be considered as a nullity. The evidence itself shews that it was no part of his return. He returned that he had caused four knights to be sum-

1819.  
WINDLE  
v.  
RICARDO.

1819.  
WINDLE  
v.  
RICARDO.

moned, that must mean legally summoned, for the purpose of the administration of justice. With respect to the objection which has been raised, as to the knights not having been summoned till after the commencement of the assizes, I think it is unavailable: for although the assizes generally continue several days, yet, in point of law, they are considered as forming but one day. A subpoena therefore commands the attendance of witnesses on the commission day, but it is very often served several days afterwards, when the cause is about to be called on, and yet this has never been considered as bad service. The summons here was, in substance, to require the attendance of four knights at the assizes: and the first of *April* being inserted in such summons, was merely to shew that that was the day on which the commission was to be opened. I am therefore of opinion that there is no count in the declaration on which the present action can be supported.

Mr. Justice RICHARDSON.—I entirely concur with the rest of the Court. The memorandum made by the crier, after the sheriff's return, formed no part of the return; and, therefore, none of the counts, but the fifth, can be supported, as they are founded on a false return. The fifth is framed to impute negligence to the defendant; but, from the facts as stated, I think he has done his duty in the most effectual manner. He procured the attendance of four gentlemen, who were on the grand jury, and who undertook to appear. Although two of them were absent when called on, it was not owing to any default of the sheriff in causing them to be summoned, but because they thought their appearance would not be required. It does not appear by the declaration that the plaintiff was prevented from suing out a writ of *habeas corpora recagnitorum* in his not having returned the

names of the recognitors. The plaintiff, therefore, has not been damnified; and as the defendant can be only liable for a false return, or negligence, I think with the Court that the rule for entering a verdict for him must be made

Absolute.

1819.  
WINDLE  
v.  
RICARDO.

BENNETT v. KINNEAR.

CURRIE v. The same.

Tuesday,  
May 11.

Mr. Serjt. *Oslow*, on a former day in this term, had obtained a rule *nisi*, that the time for the defendant's bail to justify in this cause, or to surrender him in their discharge, should be enlarged, and that in the mean time further proceedings might be stayed. The defendant, with four others, had lately been committed to *Newgate*, by the Court of *King's Bench*, for a conspiracy, where he was now detained, and was in the course of this term to be brought up for judgment in that Court. Bail above had been put in here, and excepted against, and the defendant was brought up before one of the Justices of this Court at chambers by *habeas corpus*, to be rendered in discharge of his bail; but the learned Judge declined to interfere, in consequence of which the present motion was made; and the case of *Hodgson v. Temple* (a) was relied on in its support.

If a defendant be in the criminal custody of the Court of *King's Bench* for a conspiracy, this Court will not take him out of such custody, in order to surrender him in discharge of his bail.

Mr. Serjt. *Vaughan* now shewed cause, and observed, that the bail here had been excepted to, and were not perfected. That in the case of *Hodgson v. Temple*, the

(a) 1 *Marsh.* 166.



1619.  
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 BENNETT
 v.
 KINNEAR.

application to the Court was made by the bail for relief, and they had duly justified, and therefore could not surrender the defendant. That in *Grant v. Fagan* (a), the time for bail to render their principal was not allowed to be enlarged, because the latter was unwarrantably detained as a prisoner of war in *France*; and Lord *Ellenborough* there held, that nothing but an act or law of our own state excused the performance of the condition.

But the Court held that as this was an application on the part of the bail, and as the defendant was in the criminal custody of the Court of *King's Bench*, they could not interfere so as to control their sentence; and Mr. Justice *Richardson* mentioned a case of *Baddeley v. Davis* (b), where an application similar to the present had been granted.

Rule absolute.

(a) 4 E. R. 189.—(b) H. T. 53 Geo. 3. M. S.

Tuesday,
 May 11.

THOMSON, q. t. v. PEARSE, Esq. M. P.

An army clothier, who contracts with a colonel of a regiment or his agents to furnish clothing for such regiment, is not within the statute 22 G. 3.

c. 45, which renders all persons holding contracts for the public service, incapable of being elected or sitting in the House of Commons.

THIS was an action of debt brought against the defendant to recover penalties to the amount of £8000, alleged to be due from him for having been elected and taken his seat in Parliament contrary to the provisions contained in the statute 22 Geo. 3. c. 45, which was passed for restraining persons concerned in any con-

tract, commission, or agreement made for the public service, from being elected, or sitting and voting as a member of the House of Commons (a).

1819.

 THOMSON
 v.
 PEARSE.

(a) By the first section of that statute it is enacted, that "Any person who shall directly or indirectly, himself, or by any person whatsoever in trust for him, or for his use or benefit, or on his account, undertake, execute, hold, or enjoy, in the whole, or in part, any contract, agreement, or commission, made or entered into with, under, or from the commissioners of his majesty's treasury, or of the navy or victualling office, or with the master general or board of ordnance, or with any one or more of such commissioners, or with any other person or persons whatsoever, for or on account of the public service; or shall knowingly and willingly furnish or provide, in pursuance of any such agreement, contract, or commission which he or they shall have made or entered into as aforesaid, any money to be remitted abroad, or any wares or merchandize to be used or employed in the service of the public, shall be incapable of being elected, or of sitting or voting as a member of the house of commons during the time that he shall execute, hold, or enjoy any such contract, agreement, or commission, or any part or share thereof, or any benefit or emolument arising from the same."

By the ninth section it is enacted, "That if any person thereby disabled, or declared to be incapable to sit or vote in parliament, shall, nevertheless, be returned as a member to serve for any county, stewartry, city, borough, town, cinque port, or place in parliament, such election and return are thereby declared to be void; and if any person who is disabled, and declared incapable by that act to be elected, shall, after the end of that present session of parliament, presume to sit or vote as a member of the house of commons, such person, so sitting or voting, should forfeit the sum of five hundred pounds for every day in which he should sit or vote in the said house, to any person or persons who should sue for the same in any of his majesty's courts at *Westminster*, and that the money so forfeited should be recovered by the person or persons so suing, with full costs of suit, in any of the said courts, by any action of debt, bill, plaint, or information: and that every person against whom any such penalty or forfeiture should be recovered by virtue of that act, should be from thenceforth incapable of taking or holding any contract, agreement, or commission for the public service, or any share thereof, or any benefit or emolument from the same in any manner whatsoever."

1819.
 THOMSON
 v.
 PEARSE.

The plaintiff declared, that the defendant heretofore, and after the end of the session of parliament mentioned in a certain act, made in the 22d year of the reign of our sovereign Lord the now King, to wit, at *Westminster*, in the county of *Middlesex*, for restraining any person concerned in any contract, commission, or agreement made for the public service, from being elected, or sitting and voting as a member of the house of commons, to wit, on the 6th day of *June*, 1818, to wit, at *Westminster*, in the county of *Middlesex*, did make and enter into a certain contract with one *Oliver Nicolls*, esq. for and on account of the public service; that is to say, a certain contract for the furnishing and providing divers, to wit, 1088 suits of clothes for the 66th regiment of foot, for the service of 1819, and which said contract defendant held and enjoyed from the said 6th day of *June*, 1818, aforesaid, continually, until and upon the 24th day of *December*, in the year last aforesaid; and that, in pursuance of the said contract, and during the time last aforesaid, to wit, on the said 24th day of *December*, 1818, aforesaid, to wit, at *Westminster* aforesaid, in the county of *Middlesex*, aforesaid, the said defendant did knowingly and willingly furnish and provide the said 1088 suits of clothes, to be used in the said public service as

And by the tenth section it is enacted, "That in every such contract, agreement, or commission, to be made, entered into, or accepted, as aforesaid, there should be inserted an express condition, that no member of the house of commons should be admitted to any share or part of such contract, agreement, or commission, or to any benefit to arise therefrom: and that in case any person or persons who had or have entered into, or who should enter into or accept any such agreement, contract, or commission, should admit any member or members of the house of commons to any part or share thereof, or to receive any benefit thereby, all and every such person or persons should, for every such offence, forfeit and pay the sum of five hundred pounds, to be recovered, with full costs of suit, in the same manner as was expressed in the ninth section."

1819.
 THOMSON
 v.
 PEARSE,

aforesaid; by reason of which said premises, and by force of the said act of parliament, the defendant, during all the time last aforesaid, was a person incapable of being elected a member of the said house of commons, or of sitting as a member of the said house, to wit, at *Westminster* aforesaid, in the county aforesaid. And the plaintiff averred, that the defendant, so being a person disabled, and declared incapable by the said act to be elected a member of the said house of commons as last aforesaid, afterwards, to wit, on the 18th day of *June*, 1818, aforesaid, to wit, at *Westminster* aforesaid, in the county aforesaid, was elected to serve as a member of the said house of commons, to wit, for the borough of *Devizes*, in the county of *Wilts*; and afterwards, to wit, on the same day and year last aforesaid, to wit, at *Westminster* aforesaid, was, in pursuance of such election, returned as a member to serve for the said borough of *Devizes* in parliament, and that the defendant, not regarding the said act of parliament, nor fearing the penalties therein contained, after the end of the said session of parliament, in the said act mentioned, and within twelve calendar months before the commencement of this suit, to wit, on the 21st day of *January*, 1819, aforesaid, to wit, at *Westminster* aforesaid, in the county aforesaid, under colour of the said return, did presume to sit as a member of the said house of commons for the said borough of *Devizes*:—By reason whereof, and by force of the statute in such case made and provided, the defendant forfeited the sum of £500, for the said day on which he so presumed to sit as a member of the said house of commons, as aforesaid, and an action hath accrued to the plaintiff, to demand and have of and from the defendant the said sum of £500, parcel of the said sum of money above demanded.

There were seven other counts, laying the execution

1819.
THOMSON
v.
PEARSE.

of the defendant's contract with General *Nicolls* in various ways; and a second set of eight counts similar to the first, stating that the defendant entered into a like contract with Lord *Howard*, as colonel of the 70th regiment of foot.

The defendant pleaded *nil debet*.

At the trial of the cause, before Lord Chief Justice *Dallas*, at *Westminster*, at the sittings after the last term, it appeared in evidence that the defendant was an extensive army clothier, and that he was in the habit of furnishing clothing to upwards of one hundred and forty regiments. No formal contract in writing was adduced of the defendant's having furnished clothes, but merely a written evidence of such contract, *namely*, an order sent to him from *Greenwood, Cox, & Co.* as the agents of General *Nicolls*, who was colonel of the 66th regiment of foot, to furnish clothing for that regiment, and of which the following is a copy :

" *Craig's Court*, 6th June, 1818.

" We are directed by General *Nicolls* to request you will immediately provide, *on his account*, the articles of clothing specified on the other side hereof, for the use of the 66th regiment of foot, and deliver the same to the packers, Messrs. *Hayter, Howell, & Co. Mark Lane*, who have been instructed to report to us the date when they receive them.

" Your most obedient servants,
" *Greenwood, Cox, & Co.*"

This order was addressed to the defendant, and on the other side was specified the clothing to be sent for the whole of the 66th regiment; and on the back of the order, the following memorandum was made of the delivery :

"1818, July 31st.

1819.

"Shipped *per* the British Colony for the Cape of Good Hope."

THOMSON
v.
PEARSE.

It was also duly proved that on the 18th *June*, 1818, the defendant had been elected to serve in parliament for the borough of *Devizes*, and that on the 31st of *July* following, he furnished the clothing as specified, and in pursuance of the above order. It further appeared that the defendant had no connexion with any person, but the colonels of regiments, or their agents; and that such clothing was paid for by such agents for and on behalf of the colonels, whose duty it is to clothe the regiments which they respectively command; that the army clothier looks only to the colonels for payment, and has no connexions whatever with government, nor is he paid by them; that the colonels sometimes give the orders themselves, but that the clothing is usually sent to the packers, and by them to the respective regiments; that the defendant, in this case, had received no orders from the army department to provide clothing, but only from *Greenwood, Cox, & Co.* as the agents of General *Nicolls*. It was further proved, that colonels of regiments may employ any one to furnish clothes they may think proper, and that the remainder of the money, after the equipment of the regiment, belongs exclusively to them.— Under these circumstances, his Lordship was of opinion, that this could not be considered, on the part of the defendant, as a dealing or contract with government on account of the public service, but exclusively with General *Nicolls*, as the colonel of the 66th regiment, and consequently directed a nonsuit, but gave the plaintiff leave to move that a verdict might be entered for him for a single penalty, *viz.* £500.

1819.
 THOMSON
 v.
 PEARSE.

Mr. Serjt. *Laves*, on a former day in this term, having accordingly obtained a rule *nisi*, that this nonsuit might be set aside, and a verdict entered for the plaintiff for £500, and cited the cases of *Macbeath v. Haldimand* (a), *Myrtle v. Beaver* (b), *Rice v. Chute* (c), and *Rice v. Everitt* (d), in its support,

Mr. Serjt. *Lens*, and Mr. Serjt. *Taddy*, afterwards shewed cause.—From the evidence adduced at the trial, it is quite clear that the defendant cannot be considered as having contracted with government for the public service, so as to bring him within the penalties of the 22 Geo. 3. c. 45.—The only persons who may be deemed contractors with government for the supply of army clothing are the colonels of regiments themselves, but even they do not fall within the statute. The statute is only applicable to written contracts, for it is provided by section 10, that in every contract entered into on account of the public service, there shall be inserted an express condition, that no member of the house of commons shall be admitted to any part or share of such contract. That provision therefore cannot apply to such a contract as the present. Even the colonel is not bound to enter into a contract with government for the supply of clothing. This mode of dealing between the defendant and the colonel was never in the contemplation of the legislature. It is part of the colonel's duty to supply the clothes for his regiment, and he is furnished with money in order that he may exercise such duty; but he is not bound by contract to do so, but by the uniform course of duty. But the contract made by

(a) 1 T. R. 172.—(b) 1 E. R. 135.—(c) 1 E. R. 579.
 (d) 1 E. R. 583, n.

the defendant, is a mere personal contract between himself and the colonel, through the intervention of an army agent. The clothier enters into no contract with government, for the colonel is personally responsible to him, and if he fail, the colonel must be the loser, and get the supplies furnished elsewhere. Besides, the colonel receives an emolument from furnishing the clothing, for, after the regiment is equipped, if any money remains, it belongs exclusively to him, not by virtue of his contract, but from the nature of his employment. If a soldier deserts with his clothes, the colonel must bear the loss, and furnish the man with clothing who is appointed in his stead, at his own expense. The colonel may supply his regiment with clothes without the intervention of an army clothier, for he might be furnished with such supplies from different manufacturers or tradesmen; and can it be said that these persons are contractors with government because they furnish those articles to the colonel? Both the persons who furnish the goods, and those who order them would be liable, in case the doctrine contended for were allowed, provided they knew that such goods were intended for the use of government.

1819.

 THOMSON
 v.
 PEARSE.

Adjournatur.

Mr. Serjt. *Lawes* this day, in support of the rule, premised that it had been objected that this case did not come within either the letter or spirit of the 22 *Geo. 3*, c. 45, as that statute applies only to contracts made with government, or persons representing them, and not to contracts entered into with private individuals; and that consequently, as General *Nicolls* was acting in his private capacity, that the contract entered into between his agents and the defendant was not touched on by the statute. Whether the transaction took place in a pri-

1819.
THOMSON
v.
PEARSE.

vate or public capacity will make no difference as to the construction of the statute, for it contains a general law, applicable to all persons contracting, if such contract be ultimately made for the public service. As to the objection, that the contract, in this case, was not in writing, although the tenth section of the statute requires that in every such contract there shall be inserted an express condition that no member of the house of commons shall be admitted to any share or part thereof; yet that clause is merely directory. If a contract in writing were always necessary, the statute might easily be avoided. It has not only been contended that the statute is only applicable to immediate contracts with government, but a distinction has been drawn between those persons who enter into immediate, and those who enter into remote contracts. The leading object of the statute is to prevent undue influence; if therefore that be the object, whether the contract be immediate or remote it is still within the mischief contemplated by the act. It has been further contended that the contract must be entered into with the government itself, but no authority has been cited to support such a construction. [Lord Chief Justice *Dallas*.—Is the colonel of a regiment incapacitated from sitting in parliament, because he provides his men with clothing?] A colonel does not come within the meaning of the statute, because he is acting compulsorily, for it is his duty, as colonel, to furnish clothing for the use of his regiment. It has been said, that if the defendant be liable, so also would those tradesmen be who furnish the different articles, and who are remote contractors. By the terms of the first section any persons holding contracts for the public service are disqualified; they need not therefore be principal contractors, and enter individually into such contracts with government, in order to be rendered incapable of being

elected or sitting in parliament.—[Lord Chief Justice
Dallas.—The words of that section extend to persons
 who shall execute, hold, or enjoy, any contract, agree-
 ment, or commission; made or entered into with com-
 missioners on account of the public service.] In that
 case the colonel would be responsible, for he is the only
 person to whom a commission is delegated by govern-
 ment, and he alone is required by them to furnish the
 clothing for his regiment. But it has been said that if
 the army clothier be liable, so must be all tradesmen who
 furnish him with the articles to supply such clothing,
 and that if the colonel come within the statute, the clothier
 must be exonerated, as he has no commission from, or
 even a communication with government, neither is he
 their agent, nor does he individually enter into any con-
 tract with them. But this statute can only apply to con-
 tractors in the public and ordinary sense, for the evident
 intention of the legislature was to restrain persons who
 might enter into extensive and lucrative contracts with
 government from sitting in parliament, on the ground of
 public policy, as by holding such contracts they might
 be considered under the undue influence of govern-
 ment. Either the statute must be confined to persons
 who enter into an immediate contract with government,
 or be extended to all those who furnish the various
 materials. Besides, the statute is highly penal, and
 must be most strictly construed, for its sole object is to
 prevent the immediate influence of government, on per-
 sons entering into contracts with them, but it cannot be
 inferred that this is to extend to all sub-contractors
 All persons therefore holding contracts with any of the
 public boards, and for the public service, are restricted
 by the statute from sitting in parliament; but the statute
 must be limited to those persons, as they might be con-

1819.
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 THOMSON  
 v.  
 PEARSE.

1819.

THOMSON  
v.  
PEARSE.

aided to be under the immediate influence of government, on account of public beneficial contracts. Even the possibility of such influence has been contemplated and looked to by the legislature. As to the letter of the act, it must be admitted to be general, for the title is in the most general terms possible, and no distinction is made as to contracts entered into with particular persons, but restrains any person concerned in any contract made for the public service, from being elected or sitting in the house of commons: The first section enacts, that any person who shall directly or indirectly hold such contract shall be incapable of sitting in parliament; therefore, whether the persons entering into these contracts be the immediate or remote parties, it makes no difference, for the first clause extends further, for it prohibits contracts for the public service with his majesty's commissioners, or any other person or persons whatsoever. With regard to the contract, the statute is as general as possible; yet it has been said, that its operation must be limited, because the commissioners of the treasury, navy, or victualling office, or master general, or board of ordnance, are specifically enumerated; but it does not follow, because they are particularly mentioned, that the contracts must be entered into with them alone, for the clause goes further, and states, "or with any person or persons whatsoever." The contract here was made by the defendant on account of the public service, and is equally as extensive as if it had been entered into with the victualling office or the board of ordnance. The operation of this statute may extend to those whose personal responsibilities do not attach, if they come within the mischief of the act. Public boards are merely agents for the public service. Equally so are colonels of regiments; and yet it has been said that

the furnishing clothing by the latter cannot be on account of the public service, because the surplus that remains belongs to them as such colonels; but that does not alter either their character or the nature of their service. But the contract here is between the army clothier and the colonel, on account of the public service. By the third section of the statute, individual characters only are looked to, for it contains a proviso that the act shall not extend to incorporated trading companies; and by the seventh section, members of the house of commons holding such contracts may abandon them on giving twelve months notice. To whom is the notice to be given? "To the person or persons with whom such contract is made." If the first section of the statute, therefore, applies only to his majesty's commissioners or public boards, so it might be said that the seventh section is only applicable to those public characters; but in this latter section, there is no specific appropriation of persons. It has been further said that this was not a contract made by the defendant with government, but with General *Nicolls*. Apparently it is so, but the contract was not made with him individually, for he was acting on account of the public service, and it was his duty to see his regiment clothed, in his public character as colonel. He cannot therefore be considered as personally responsible. On the authority of *Macbeath v. Haldimand* (a), and *Unwin v. Wolsely* (b), the colonel could not be liable, for it was there decided that an officer appointed by government, treating as an agent for the public, is not liable to be sued upon contracts made by him in that capacity; no action can therefore be maintained against General *Nicolls*, as it was part of his public duty to provide his regiment with clothing.

1819.  
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 THOMSON
 v.
 PEARSE.

(a) 1 T. R. 172.—(b) 1 T. R. 674.

1819.
 THOMSON
 v.
 PEARSE.

In *Rice v. Chute* (a), and *Rice v. Everitt* (b), it was held, that the captain of a troop is not liable for subsistence furnished to his men by his official orders, unless, in fact or legal effect, he has received the subsistence money; so, in *Myrtle v. Beaver* (c), the captain was held not liable for such subsistence furnished during his absence, though the orders for subsistence were issued by another officer, and though the captain was still entitled to a profit upon the sum issued on that account, and the troop still continued under his military orders. The principle established by these cases is, that all the parties were acting in their public character for the public service, and on no personal responsibility. This case therefore falls within the mischief the 22 Geo. 3, intended to prevent, as the words of that act are general, and the contract in question was entered into by the defendant on account of the public service.

Lord Chief Justice DALLAS.—This is an action of debt, and brought to recover penalties from the defendant to the amount of £8000, for having sat and voted in parliament contrary to the 22 Geo. 3. c. 45, but this sum has been narrowed by the verdict to one penalty, namely £500, and the only question now is, whether the defendant be liable to pay that sum. It is now thirty-five years since that statute was passed, during which time several general and other elections for representatives in parliament have occurred, and during the greater part of this period this country has been at war with other nations, and it has been consequently necessary to keep up a large army, and furnish the respective regiments forming such army with clothing and necessary equipments; and yet

(a) 1 E. R. 579.—(b) 1 E. R. 583. n.—(c) 1 E. R. 135.

an action similar to the present has never been brought, nor has the objection now raised been ever before made. It is necessary to consider the situation of the defendant, in order to see whether he be liable to this penalty or not. If the law be clear, this will make no difference; but the universal silence that has reigned in *Westminster Hall*, since this statute was passed, affords strong grounds to shew the general understanding of the profession, as to whether an action like the present be maintainable or not. What are the facts of the case? An order was sent from government to General *Nicolls* to clothe the men of the 66th regiment of foot, of which he was the colonel: it was his duty as such colonel to comply with the order, and he contracted with the defendant, an army clothier, to complete the order, and carry it into effect. I put it to the plaintiff's counsel to say whether any colonel of a regiment, receiving such orders from government, and directing others to execute them, was to be considered as a contractor for the public service, so as to render him incapable of sitting in parliament? and it was admitted that he was not; but a distinction was drawn between the colonel of a regiment, and the army clothier, who furnishes the clothing. But the colonel derives the greatest emolument by this order, and he has an immediate communication with government, from whom he receives it; and yet it has been said, that although he be not incapacitated from sitting in parliament yet that the army clothier, who receives no emolument but that which is to be derived in the exercise of his trade, must be considered incapable of so doing. By the evidence it appeared that the defendant received the order from the agents of General *Nicolls*; that he had been thirty-five years an army clothier to a considerable extent, and that during that period he had no communication whatever with government. By the

1819.
 THOMSON
 v.
 PEARSE.

1819.
THOMSON
v.
PEARSE.

terms of the order, *Greenwood, Cox, & Co.*, stated that they were directed by General *Nicolls* to request the defendant to provide the clothing *on his account*, and not on the account of government. On the true construction of this statute, the defendant is not bound by any order, except that which he consented to receive, and he consented to receive and execute this order for General *Nicolls*. The General was debited in the defendant's books, to the amount of the order. The defendant had no communication whatever with government, but looks to General *Nicolls* alone for payment. The order was received by him on *the account* of General *Nicolls*. How, therefore, could he be acquainted with what had previously passed between the General and the government? Even the General himself might have had no contract whatever with government; and yet it has been insisted that as the articles furnished by the defendant were applied to the public service, that he is to be considered as a contractor with government. The army clothier receives the order in the first instance from the colonel, or his agents, and then gives directions to the draper and tailor, who employ others under them to complete the order; and it has been said that because the articles furnished are to be employed for the public service, that even these subordinate persons are equally liable as the army clothier. I cannot think that this was the intention of the statute, but that, as well on reason, as the true construction of the act, the defendant cannot be considered liable to the penalty now sought to be recovered.

Mr. Justice PARK.—This case has been very fully gone into by my Lord Chief Justice; yet, as this is the first time an action similar to the present has been brought, I shall merely add a few remarks. It has been very

ably argued for the plaintiff, by my brother *Larves*, and the object the legislature had in view at the time this statute was passed, has been truly stated to be the prevention of an undue influence with government, by means of contracts entered into with certain of his majesty's commissioners, as specified in the first section, or "with any other person or persons whatsoever, on account of the public service:" these latter words must mean persons of a similar description with those commissioners, and cannot apply to persons who enter into contracts at a remote distance from them; for the consequences of a more general construction would be absurd, as even the tailors, who make the clothing, would be liable to the penalties of this statute, as the clothes when made would be ultimately supplied for the public service. The evidence alone is sufficient to negative the arguments that have been raised for the plaintiff. The order was given to the defendant, by the direction of General *Nicolls*, and the articles were furnished on his account. The colonel derives the principal emolument from the execution of the order, as he puts the surplus in his own pocket. General *Nicolls* was alone debited by the defendant, and not the government. The cases too which have been cited for the plaintiff negative the argument adopted in his favour. In *Macbeath v. Haldimand* (a), the captain was treating as an agent for the government. So, in *Unwin v. Wolsely* (b), though the contract was by deed, yet it was made by a servant of the crown, on account of government. In *Rice v. Chute* (c), the party was the mere agent of government, and not contracting on his own account, although he received no emolument for so doing. Looking therefore to the evidence in this case, and the principles laid down in those that have been cited, I think

1819.
 THOMSON
 v.
 PEARSE.

(a) 1 T. R. 172.—(b) 1 T. R. 674.—(c) 1 East, 579.

1819.
THOMSON
v.
PEARSE.

the defendant is not either within the letter or intention of the 22 Geo. 3, and that persons holding contracts in a remote degree, cannot be considered as contractors with government.

Mr. Justice BURROUGH.—I am of opinion that the defendant, neither in intent or reason falls within this statute, which was passed solely for the prevention of undue influence with the crown. There has been no contract between the defendant and government, or any person immediately employed on their behalf. The statute merely prohibits persons from holding contracts with certain of his majesty's commissioners and public boards, "or any other person or persons," which must mean a prohibition of contracting with the then existing boards, and other similar boards which might be created thereafter. The tenth section is infinitely stronger than the first, for every contract must be in writing, because the boards could not pass their accounts unless they were so, and for this reason that clause was introduced. Many colonels of regiments have had actions brought against them for the price of the clothing furnished to such regiments. The contract here was made with the clothier on the colonel's account. The former derives his profit from cutting out and making the clothes; but the colonel reaps the benefit of the surplus, for whatever remains belongs exclusively to him. He makes the best contract he can with the clothier, and derives the greatest benefit from the contract. What influence is given to government over him by this contract? In *Macbeath v. Haldimand*, the defendant was contracting with government, but here he was contracting with the colonel of a regiment. I, therefore, think that, as well on the reason of the case, as the evidence adduced at the trial, there is no foundation for the plaintiff to sustain this action.

Mr. Justice RICHARDSON.—I am entirely of the same opinion. If this statute be not applicable to contracts entered into with government by the colonels of regiments, much less so will it apply to contracts entered into by army clothiers, who are, in fact, subcontractors. The statute can only extend to those who enter into an immediate contract with government; if it were otherwise, in time of war, in which during these last thirty years this country has generally been engaged, and in which it has been necessary to furnish a large proportion of clothing for the supply of the army, a considerable number of respectable individuals, who furnish such supplies, would be thereby incapacitated from sitting in parliament. If the transport board enter into a contract for ships to convey troops, the owners of every such ship must contract with other persons for necessities, and a number of stores are required in fitting her out. Are those who furnish such necessities and stores excluded by this statute from holding seats in parliament? If, during war, manufacturers of arms employ artizans in such manufacture, are those artizans to be excluded from serving in parliament as well as the manufacturers themselves? It is impossible to draw the line of distinction, if so large a scope were given to the construction of this statute. If the colonel of a regiment is not to be considered as holding a contract under government, it is monstrous to say that the defendant, who has a personal contract with such colonel, should be excluded the privilege of sitting in parliament. The words of the act may apply to contracts which are not immediate with government, namely, to persons entering into a contract in the name of the original contractor, and for his use and benefit. The words, "any or other person or persons," must mean persons of a like description, namely, persons acting as the agents of government, and not like the colonels of regiments, who

1819.
 THOMSON
 v.
 PEARSE.

1819.
 THOMSON
 v.
 PEARSE.

are personally liable to those tradesmen they may employ, and who are clearly at liberty to employ any tradesmen they may think proper. The defendant here has not been benefited by any contract he has entered into with government; he looked to General *Nicolls* for the performance of his personal contract to him, as colonel of the 66th regiment, and had no participation of the colonel's profit or loss with government. Under these circumstances I think the statute does not apply to him, and, therefore, concur in saying, that this rule must be

Discharged.

Tuesday,
 May 11.

ANDREW v. HANCOCK.

A tenant having paid land-tax and paving rates for six successive years, without claiming any deduction from his landlord for these payments when he paid his rent.—

Held: that such deduction should be made from the rent of the current year, and that the tenant

could not claim it from his landlord at any subsequent period.—To an avowry in replevin for rent in arrear, the plaintiff pleaded in bar, payments for land-tax, and paving rates for six successive years, in order to avoid a distress; and that the sums so paid by him exceeded the amount of the rent distrained for.—*Held:* that such a plea was bad on demurrer, as the tax and rates should have been deducted by the plaintiff from the rent of the current year, and as the plea in substance amounted and was equivalent to a set-off.

THIS was an action of replevin, for taking goods in the plaintiff's dwelling-house. The defendant avowed first for £30, being two quarter's rent due the 29th of *September*, 1818: and, secondly, for £15, being a quarter's rent due on the same day: To the first of these avowries the plaintiff pleaded in bar, that he, on the 23d of *March*, 1812, and from thence until the 1st of *May*, 1818, held and enjoyed the dwelling-house, in which &c. as tenant to the defendant, upon the terms specified in the avowries (the payment of rent quarterly), and that on the 25th of *March*, 1812, £2: 5s.: 6d. became due and payable in respect of the land-tax, before then assessed on

the said dwelling-house, in which, &c., and that after the said sum had become so due and payable, and before the said time when, &c. to wit, on the 23d of *March*, 1813, the plaintiff, being the tenant and occupier of the said dwelling-house, in which, &c. in order to prevent his goods therein from being distrained at the day and year last aforesaid, paid the said sum of £2 : 5s. : 6d. so due and in arrear as aforesaid. The plea then went on to state that the like sum was due for the land-tax for the half year, ending on the 29th of *September*, 1812, and the 25th of *March*, 1813, and paid by the plaintiff; and a like statement by three years payment for the years ending on the 25th of *March*, 1814, to the 25th of *March*, 1817. The plaintiff then averred that before the said time, when, &c. to wit, on the said 25th of *March*, 1812, and on divers other days, between that day and the first of *May*, 1818, divers sums of money, in the whole amounting to £32 : 10s., became due and payable for rates, for paving certain streets and lanes within the parish of *Saint Saviour*, in the borough of *Southwark*, by virtue of a certain statute in that case passed, being before the said several last-mentioned times assessed and charged upon the said dwelling-house, in which, &c. part of which rates, to wit, £7, ought to have been paid and discharged by the defendant, as owner of the said dwelling-house: and that before the said time, when, &c. to wit, on the 1st of *September*, 1818, the said sum of £7, being so in arrear and not discharged by the defendant, he, the plaintiff, as tenant and occupier of the said dwelling-house, was duly required, according to the form of the statute, to pay and discharge the said sum of £7; and, thereupon in order to prevent his goods there being in the dwelling-house from being distrained, the plaintiff, when he was so required, paid the said sum of £7, so due from the de-

1819.
ANDREW
v.
HANCOCK.

1819.
ANDREW
v.
HANCOCK.

fendant, as owner of the said house. And the plaintiff further averred, that the several sums of money so paid by him amounted to £90 : 9s. : 7d, and that the same greatly exceeded the amount of the rent due and in arrear from the plaintiff to the defendant, in manner and form as the defendant had in his avowry in that behalf alleged. And this, &c. wherefore, &c.

There was a similar plea to the second avowry.

To both these pleas there was a general demurrer, and the plaintiff joined in demurrer.

The case came on for argument on a former day in this term, when

Mr. Serjt. *Taddy*, in support of the demurrer, observed, that the question raised was, whether if a tenant omit to deduct out of the rent of the current year payments made by him on account of land-tax and paying rates, he might make such deduction at any distance of time, and pay the arrears of several years at once, although more than six years might have elapsed since the first payment for such taxes was due? He objected to the form of the pleas, as neither of them averred that the land-tax was due from the defendant, or that he was the owner of the house, and submitted that they were bad in substance, as they amounted, in effect, to a set-off, which cannot be pleaded in replevin. This case differs from that of *Sapsford v. Fletcher* (a), as the pleas there averred a demand of payment of the arrears of rent from the defendant previous to the demand on the occupier who paid the same; but here there was no averment of the occupation of the plaintiff, but merely that he was a tenant to the defendant. In that case there was no doubt as to the payment, and the defendant

(a) 4 T. R. 511.

must have known that the ground-rent was unpaid; but here there might have been several landlords. Independently of this, the 38th Geo. 3. c. 5. (the general and first permanent land-tax act) will set this question at rest, as by section 17 (a), the mode of allowance to the tenant to deduct the land-tax from his rent is laid down in express terms. That being an annual act, the rent therein expressed can only apply to the particular or current year in which the land-tax was to be paid. The next accruing rent must mean the rent which would become due within that year only. It cannot be presumed that tenants are authorised to make such deductions at a future year, for another statute might not be passed to allow these deductions to be made in such subsequent year, nor might the land be rated in the same proportion. The property-tax act (b) has received a similar construction in the late case of *Denby v. Moore* (c), and although a distinction may be drawn, as to a tax imposed on land, from that on property, still the effect of both these statutes is the same. By the 46th Geo. 3. c. 65, schedule A. No. 4, rule 9. it was expressed that the deductions made by the tenants on account of the property-tax should be out of the first payment, thereafter to be made on account of rent; and though it was contended in *Denby v. Moore*, that the tenant was empowered

1819.

 ANDREW
 v.
 HANCOCK.

(a) By which it is enacted, "that the several and respective tenant or tenants of all houses, lands, tenements, and hereditaments which should be rated by virtue of that act, were thereby required and authorised to pay such sum or sums of money as should be rated upon such houses, lands, tenements, or hereditaments, and to deduct out of the rent so much of the said rate as in respect of the said rents of any such houses, lands, tenements, and hereditaments, the landlord should and ought to pay and bear: and the landlord, both mediate and immediate, according to their respective interests, were thereby required to allow such deductions and payments upon the receipt of the residue of the rent."

(b) 46 Geo. 3. c. 65.—(c) 1 Barn. & Ald. 123.

1819.
THOMSON
v.
PEARSE.

sidered to be under the immediate influence of government, on account of public beneficial contracts. Even the possibility of such influence has been contemplated and looked to by the legislature. As to the letter of the act, it must be admitted to be general, for the title is in the most general terms possible, and no distinction is made as to contracts entered into with particular persons, but restrains any person concerned in any contract made for the public service, from being elected or sitting in the house of commons: The first section enacts, that any person who shall directly or indirectly hold such contract shall be incapable of sitting in parliament; therefore, whether the persons entering into these contracts be the immediate or remote parties, it makes no difference, for the first clause extends further, for it prohibits contracts for the public service with his majesty's commissioners, or any other person or persons whatsoever. With regard to the contract, the statute is as general as possible; yet it has been said, that its operation must be limited, because the commissioners of the treasury, navy, or victualling office, or master general, or board of ordnance, are specifically enumerated; but it does not follow, because they are particularly mentioned, that the contracts must be entered into with them alone, for the clause goes further, and states, "or with any person or persons whatsoever." The contract here was made by the defendant on account of the public service, and is equally as extensive as if it had been entered into with the victualling office or the board of ordnance. The operation of this statute may extend to those whose personal responsibilities do not attach, if they come within the mischief of the act. Public boards are merely agents for the public service. Equally so are colonels of regiments; and yet it has been said that

the furnishing clothing by the latter cannot be on account of the public service, because the surplus that remains belongs to them as such colonels; but that does not alter either their character or the nature of their service. But the contract here is between the army clothier and the colonel, on account of the public service. By the third section of the statute, individual characters only are looked to, for it contains a proviso that the act shall not extend to incorporated trading companies; and by the seventh section, members of the house of commons holding such contracts may abandon them on giving twelve months notice. To whom is the notice to be given? "To the person or persons with whom such contract is made." If the first section of the statute, therefore, applies only to his majesty's commissioners or public boards, so it might be said that the seventh section is only applicable to those public characters; but in this latter section, there is no specific appropriation of persons. It has been further said that this was not a contract made by the defendant with government, but with General *Nicolls*. Apparently it is so, but the contract was not made with him individually, for he was acting on account of the public service, and it was his duty to see his regiment clothed, in his public character as colonel. He cannot therefore be considered as personally responsible. On the authority of *Macbeath v. Haldimand* (a), and *Unwin v. Wolsely* (b), the colonel could not be liable, for it was there decided that an officer appointed by government, treating as an agent for the public, is not liable to be sued upon contracts made by him in that capacity; no action can therefore be maintained against General *Nicolls*, as it was part of his public duty to provide his regiment with clothing.

1819.
 THOMSON
 v.
 PEARSE.

(a) 1 T. R. 172.—(b) 1 T. R. 674.

1819.
~
ANDREW
v.
HANCOCK.

has been deemed necessary. In point of law the landlord is bound to pay the land-tax and paving rates, and he is therefore bound to take notice when these taxes become due and payable. The pleas therefore are good in form, but the plaintiff is equally entitled to recover on the merits. It has been admitted that the plaintiff has paid more money to the defendant than he was entitled to receive for rent, as the former was compelled by statute to make certain payments in respect of rates and taxes which the defendant was bound to allow. Is it reasonable, therefore, that these payments should not be deducted by the plaintiff, because they were not allowed at the end of the current year, when the relation of landlord and tenant between the parties still existed during the whole six years? This case is materially different from that of *Denby v. Moore* (a), as the language of the property-tax and land-tax act are wholly distinct; for by the former, the tax is to be deducted out of the first payment thereafter to be made on account of rent. Besides, the payment in that case was considered by the court as a voluntary payment; but here the payments were made by the plaintiff under the threat of a distress. In *Denby v. Moore*, too, it was decided that the plaintiff could not recover, as it would be productive of fraud on the property-tax act. As, therefore, the payments here were compulsory, and made by the plaintiff for the defendant, who was himself liable (for whether premises be occupied or not, still the land-tax is payable), and as there is no enactment in the land-tax act that the payments must be deducted out of the first rent, and that if the tenant neglect to do so, he may not be at liberty to deduct afterwards, the plaintiff, both in point of law and principle, as well as on the merits of the case, is entitled to recover.

Adjournatur.

(a) 1 Barn. & Ald. 123.

Mr. Serjt. *Taddy* this day in reply observed, that although a distinction had been drawn between the property and land-tax acts, yet that they were in principle the same, and that this case therefore must be governed by the decision of the Court of *King's Bench* in *Denby v. Moore*. The cases of *Taylor v. Zamira*, and *Sapsford v. Fletcher*, were inapplicable, as the deductions in both these were made from the current year from persons immediately liable, and not from an intermediate landlord, as in the present case. The power to deduct the land-tax is given by statute, and the land-tax being only an annual act, the deduction must be made from the current year. The opinion of Mr. Justice *Abbott*, in *Denby v. Moore* (a), is applicable to the present case, as the land-tax can only be considered an annual charge, and to be deducted from the yearly current rent.

1819.

 ANDREW
 v.
 HANCOCK.

Lord Chief Justice DALLAS.—This was an action of replevin, to which the defendant has averred for rent in arrear. The pleas in bar seek to deduct the whole amount of the land-tax and paving rates for six years and a half, and state, in substance, a payment of those taxes by the plaintiff, from 1812 to the time of the distress, and aver that during this period the plaintiff was tenant to the defendant, and that the amount of the sums paid by the former exceeds the rent distrained for; and the plaintiff therefore seeks to apply these payments to the extinguishment of the rent. No distinction can be drawn between the land-tax and paving acts, and it is necessary to consider whether these pleas amount to payment or a set-off. If they amount to a set-off, they cannot be

(a) 1 *Barn. & Ald.* 129.

1819.

ANDREW
v.
HANCOCK.

pleaded in this action ; if a payment, it is a defence which may be set up, and I am inclined to think that they are in effect a payment. The landlord was originally bound to pay the tax in question ; but the tenant, having paid it, was authorised and required to deduct it from his rent. The only question then is, whether the tenant ought not to have made the deduction when he paid his rent, or whether he can omit making deductions for the land-tax for six years and a half, and then set up these payments collectively against the last quarter's rent. The statute provides for three things: first, it requires the tenant to pay the land-tax ; secondly, to deduct it, therefore he is not only authorised, but required to do so ; and, thirdly, the landlord is bound to allow the deduction on the receipt of the residue of the rent. The plain and evident construction of these words is, that the tenant should deduct this tax out of each payment made to his landlord for rent. This construction is warranted and aided by the general sense and reason of the thing. Laws are adapted to common cases, and the common course to be adopted in a case of this nature would be for the tenant to deduct the sums paid for rates and taxes whenever he paid rent to his landlord. It was not in the provision of the legislature, when the land-tax act passed, that a tenant might remain dormant for more than six years, and then deduct the taxes paid during the whole of that period from the last quarter's rent. Such a construction would be productive of the greatest possible inconvenience. This case has been argued on very wide grounds ; and it has been said, that this money has been paid by the tenant for the use of his landlord, and which he therefore in conscience is bound to allow. But this argument is far beyond the present question, for if the meaning of the statute be clear, it is quite immaterial whether the land-

lord can retain this money against conscience or not, for the payments made for the land-tax must be deducted according to the statute. But is the landlord bound to allow the deduction made in this case? The pleas do not allege a notice of payment, but I do not rely on this, neither do they aver that the payments of the land-tax were made before the distress. The landlord, therefore, had a right to presume that the tenant would pay his rent as he had before usually done, and therefore distrained on him for rent in arrear, and then discovers, for the first time, that the tenant has a claim on him for taxes more than equal to the rent distrained for. But whether he had notice or not is immaterial, for the principal question is whether it is against conscience for the landlord not to allow these payments which the tenant has made? The parties may have gone on for six years or more, under an understanding or agreement that these taxes should not be paid by the landlord, or he may have allowed his tenant a more beneficial holding, in consideration of his paying them without making any deductions from the rent. The facts of the case, coupled with the tenant's having so long paid rent without calling on his landlord for such deductions, are strong grounds to raise such a presumption. The case of *Sapsford v. Fletcher* (a) does not resemble the present, nor does the doctrine there laid down by Lord *Kenyon* appear to me to be at all applicable to this question. There a single payment for ground-rent was sought to be deducted; here the tenant claims to deduct for six years and a half. But this case must be governed by principles laid down and acted on in others which have preceded it. In *Brisbane v.*

1819.

 ANDREW
 v.
 HANCOCK.

(a) 4 T. R. 511.

1819.
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 ANDREW  
 v.  
 HANCOCK.

*Dacres* (a), the plaintiff sought to recover from an executrix money paid to her testator, (a commander in the navy) under an illegal usage; and though Mr. Justice *Chambre* there differed from the rest of the court, yet it was held that where a party pays money to another voluntarily, and with full knowledge of the facts, the party so paying could not recover it back, there being nothing against conscience in the other party's retaining it, for public convenience requires that it should rest in quiet. The judgment of the late Lord Chief Justice *Gibbs*, in that case, is particularly applicable to the present, as to whether the landlord is in conscience bound to allow these deductions claimed by the tenant, for his lordship there said (b), "We must take this payment to have been made under a demand of right, and I think that where a man demands money of another as a matter of right, and that other, with a full knowledge of the facts upon which the demand is founded, has paid a sum, he never can recover back the sum, he has so voluntarily paid." So, here, the tenant paid the rent to his landlord, without making the deduction for taxes, and with a full knowledge of the facts; this, therefore, might be considered as a voluntary payment; it was, in fact, a gift to the landlord. His Lordship, however, in *Brisbane v. Dacres*, continued and said (c), "If we were to hold otherwise, I think many inconveniences might arise; there are many doubtful questions of law: when they arise, the defendant has an option, either to litigate the question, or to submit to the demand, and pay the money; I think that by submitting to the demand, he that pays the money, gives it to the person to whom he pays it, and makes it his, and closes the transaction between

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(a) 5 Taunt. 143.—(b) *Id.* 152.—(c) *Id. ibid.*

them." Here the tenant submitted to the demand for more than six years. His Lordship, in that case, went on and said, "He who receives the money has a right to consider it as his without dispute: he spends it in confidence that it is his; and it would be most mischievous and unjust, if he who has acquiesced in the right by such voluntary payment, should be at liberty at any time within the statute of limitations, to rip up the matter and recover back the money. He who received it is not in the same condition: he has spent it in the confidence it was his, and perhaps has no means of repayment." That language is particularly applicable to the justice of this case; and Mr. Justice *Heath*, in *Brisbane v. Dacres* (a), acquiesced in the doctrine laid down by Lord *Kenyon*, and approved of by Lord *Eldon*, viz. "that a payment voluntarily made is not to be recovered back:" and Lord *Mansfield*, the then Chief Justice, thought, (b) that it would be most contrary to *æquum et bonum*, if the defendant were obliged to repay the money back. "For," said his Lordship, "see how it is: If the sum be large, it probably alters the habits of his life, he increases his expenses; he has spent it over and over again; perhaps he cannot repay it at all, or not without great distress: Is he then, five years and eleven months after, to be called on to repay it?" If this case therefore turns on the broad ground, whether the defendant be in conscience entitled to retain the money paid him by the plaintiff, for rent for the last six years, the latter is not justified in making the deductions he now seeks to establish. Independently, however, of the principle established in *Brisbane v. Dacres*, the case of *Denby v. Moore* (c) appears to me to be not only in point, but decisive of the present question. The language

1819.  
 {  
 ANDREW  
 v.  
 HANCOCK.

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(a) 5 Taunt. 161.—(b) *Id.* 162.—(c) 1 Barn. & Ald. 123.

1819.  
 {  
 ANDREW,  
 v.  
 HANCOCK.

of the property-tax is not materially different from that of the land-tax act: in the one it is enacted that the tenant *shall* deduct the tax, and in the other he is required to do so. In *Denby v. Moore*, it was held, that the payments made by the occupier were voluntary, and that he could not recover back from the landlord the property-tax paid to the collector; and Lord *Ellenborough* there said (a), "when the occupier went with the money for the purpose of paying to his landlord the next rent which became due, he ought then to have made the deduction:" so ought the tenant to have done here; but his Lordship, in that case, grounded his decision on its being a voluntary payment; and added, that "he knew of no principle of law which gave such occupier a right to recover back money so paid:" and Mr. Justice *Bayley* coincided with his Lordship, and said (b), "The payment was made at a time when it was in the tenant's power to have deducted the sum in question. He must have known that he had a right so to deduct it. Knowing this, he chooses, nevertheless, to make this payment. Then that is a voluntary payment, which he cannot recover back by this action." The other ground, of fraud on which that case was decided is inapplicable to the present; but the principle there established, as to the payment being voluntary, is precisely in point. If, however, there had been no decision touching this case, I should have thought, on the construction of the words of the land-tax act, as well as in sense, reason, and general principle, that the plaintiff is not entitled to the deductions he now seeks to recover.

Mr. Justice PARK.—I perfectly concur with my Lord Chief Justice, although at first, I was inclined to en-

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(a) 1 *Barn. & Ald.* 128.—(b) *Id. ibid.*

tain a different opinion, as the observations made by Lord *Kenyon*, in *Sapsford v. Fletcher*, had great weight with me, and appeared applicable to the present; but on a more mature consideration, and the principles that have been referred to in other preceding cases, I am fully satisfied that the justice of this case is with the defendant. It is quite clear that there can be no set-off in an action of replevin. That was decided in the case of *Absalom v. Knight (a)*, which decision has been since recognised and adopted. Neither can any reflection be cast on those of *Sapsford v. Fletcher*, or *Taylor v. Zamira*. But this case turns on another ground, *namely*, that this was a voluntary payment made by the plaintiff, which he is not entitled to recover back. The first time this point came under consideration in a court of law, was in the case of *Bilbie v. Lumley (b)*; and although Lord Chief Justice *Mansfield*, in *Brisbane v. Dacres*, said (c) that that case was not argued; yet that it was a most positive decision, and observed that the counsel for the plaintiff (d) in that case was a most experienced advocate, and not disposed to abandon tenable points; and Lord *Ellenborough* asked him whether he could state any case, where if a party had paid money voluntarily, with a full knowledge of the facts of the case, it could be recovered back again?—Although this Court were not unanimous in delivering their judgment in *Brisbane v. Dacres*, yet the decision in that case is perfectly good law. The late decision of the Court of *King's Bench*, in *Denby v. Moore*, is particularly applicable to the present question; for although the property-tax may differ in terms from the land-tax act, yet the effect of both

1819.  
  
 ANDREW  
 V.  
 HANCOCK.

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(a) *Barnes*, 356. S. C. *Bull. N. Pri.* 181.—(b) 2 *East*, 469.—(c) 5 *Taunt.* 163.—(d) Mr. Baron *Wood*.




1819.  
 {  
 ANDREW  
 v.  
 HANCOCK.

these statutes is the same, and they must receive a similar construction. The intention of the legislature as to the times when the deductions were to be made is the same in both. Although in *Denby v. Moore* the Court alluded to the circumstance of fraud, yet they concur with Lord *Ellenborough* in considering it to be a voluntary payment. The plaintiff here paid the defendant his rent for more than six years, without requiring any deduction; it is therefore fairly to be presumed that there was an understanding or agreement between the parties that the tenant should pay the rates and taxes, in consideration of having the premises at a lower rent. Although this is merely a presumption, still, for the other reasons I have before given, I think the demurrer to be well-founded.

Mr. Justice BURROUGH.—I am of the same opinion. From the construction of the land-tax act, the deductions must be made out of the current year's rent. But, independently of this, both these pleas are bad; for they are, in fact, in the nature of a set-off. The plaintiff says, that the amount of the whole of the rates and taxes exceeds the rent demanded. That is in truth and substance a set-off. I perfectly concur with my Lord Chief Justice, and my brother *Park*, in the conclusions they have drawn, and should have merely assented to their opinions, had I not wished to protest against such pleas as the present being introduced in an action of replevin.

Mr. Justice RICHARDSON.—The plaintiff, by his pleas in bar, seeks to get rid of the whole of the rent due from him to the defendant; and I am of opinion that the deductions he claims by them will not avail him in this action, as payments in discharge of such rent, after he has suffered so long a period to elapse. The land-tax is

imposed on the landlord, and as the tenant is required to pay it, and deduct it out of his rent, such deduction must be made out of the rent then due or accruing, and must be considered as a payment of so much rent. The plaintiff having paid £2 : 5s. : 6d. for land-tax, in 1812, was indebted to his landlord thus much less for rent, and ought to have made the deduction from the rent then payable: he ought to have made his stand then, but with his eyes open he paid the whole rent; and, therefore, paid £2 : 5s. : 6d. more than he ought, and has continued doing so till the present distress was made. All the payments therefore have been voluntary on his part, he being fully aware that he might have made his deductions from time to time, as the rent became payable. This case therefore falls within the principles laid down in *Bilbie v. Lumley*, namely that a voluntary payment cannot be recovered back. That principle is recognized and adopted in the late case of *Denby v. Moore*. The attempt now made to deduct the payments from the rent is, in fact and substance, an attempt to recover it back. The plaintiff has paid his rent in full, from 1816 until the time of the distress, and never applied for the payments he has made for the land-tax, to be deducted. These, therefore, are to be considered as payments over and above his rent, voluntarily made by him. On this ground, alone, the present case may be decided, without infringing on those of *Saysford v. Fletcher*, or *Taylor v. Zamira*, as in both those the payments sought to be recovered were from the rent of the current year. It is impossible to surmise, whether any, or what agreement subsisted between the plaintiff and defendant, as landlord and tenant: but it is sufficient to say, that the tenant, having overpaid his rent by his own voluntary act, cannot now deduct. No material distinction can be drawn between the property-tax and

1819.  
  
 ANDREW  
 v.  
 HANCOCK.

1819.  
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 ANDREW
 v.
 HANCOCK.

land-tax acts. Although the latter does not require the deduction to be made from the *first payment* in terms, yet it does in substance, for the tenant was fully entitled to deduct out of the rent payable for the current year, and ought to have done so, or assigned some reason for not doing it. Some particular circumstances might exclude the necessity of claiming the deduction from the first payment; but here the plaintiff has laid dormant for six successive years, and, therefore, he has no excuse. A mistake might be a sufficient excuse for a tenant's not claiming the deduction. I will not say, however, that the plaintiff is not entitled to some deduction; but he can not claim it by his pleas on this record, for they do not cover the whole of the sum claimed for the rent due to the plaintiff. On these grounds, I am of opinion that both these pleas are bad, and that the defendant is entitled to judgment.

Judgment for the defendant accordingly.

Tuesday,
 May 11.


WILSON v. WELLER, and another.

Replevin cannot be maintained for goods distrained by virtue of a warrant from a magistrate who has competent jurisdiction

THIS was an action of replevin for taking the plaintiff's goods. The defendants made cognizance as the bailiffs of *Henry Hopkins, Esq.*, who at the time, when, &c. was one of the justices of the peace for the county of *Sussex*, and they well acknowledged the taking of the goods, because they said, that at the time when, &c. one under the statute of labourers, (20 *Geo. 2. c. 19. s. 1.*) to issue a warrant of distress and sale on refusal of the party to pay, nor can the question of a magistrate's jurisdiction be tried in such an action; and therefore it cannot be pleaded in bar to a cognizance made under such warrant, that the labourer did not duly make oath before the magistrate, that the sum claimed was due to him for wages, nor that such sum was not due.

John Crossweller was a labourer, and at the time of his making his complaint thereafter-mentioned, there was due to him, as such labourer, from the plaintiff a sum of money under £5, to wit, £3 : 4s., for wages, for work and labour done by *Crossweller*, for and in the service of the plaintiff. That, therefore, *Crossweller*, before the said time, when, &c. made his complaint to the said *Henry Hopkins, Esq.*, he being such justice as aforesaid, and duly made oath before him that the plaintiff had refused to pay to him, *Crossweller*, the said sum of £3 : 4s. so due to him from the plaintiff, for wages as aforesaid. That, therefore, the said justice duly summoned the plaintiff to appear before him on the 29th of *September*, 1817, at *Brighthelmstone*, in the county of *Sussex*, to answer the said complaint. The defendants then averred, that the plaintiff appeared there on that day, and thereupon *Crossweller*, in the presence and hearing of the plaintiff, did duly make oath and swear before the said justice, that the said sum of £3 : 4s. was justly due to him, *Crossweller*, and that the plaintiff had refused to pay the same; and that, thereupon, the plaintiff did not shew any just cause to the said justice why he should not pay the same: Wherefore the said *Henry Hopkins, Esq.*, so being such justice as aforesaid, on the same day and year aforesaid, duly made his order in writing, under his hand and seal, and did thereby adjudge, order, and determine, that the plaintiff should pay to *Crossweller* the said sum of £3 : 4s., which appeared to him, the said justice, to be just and reasonable to be paid by the plaintiff to *Crossweller*, as and for his wages and expenses as aforesaid; thereby meaning the said sum of £3 : 4s. so due as aforesaid, of which order the plaintiff had due notice, and due demand of the said sum of £3 : 4s. was made of the plaintiff, by *Crossweller*; yet that the plaintiff did not before the said time, when,

1819.
 WILSON
 v.
 WELER.

1819.

 WILSON
 v.
 WELLER.

&c. pay the same to *Crossweller*, but neglected so to do: Whereupon the said justice, on the 20th of *November*, in the year aforesaid, duly made and issued his warrant, in writing, under his hand and seal, directed to the constable of the hundred of *Whalesbone*, and his headborough, whereby, after reciting that *Crossweller* had complained to the said justice that the plaintiff had refused to pay the wages due to him, *Crossweller*, and that the plaintiff had been summoned before such justice to shew cause why the wages should not be paid, but had shewn none, whereupon the said justice had adjudged that the plaintiff should pay the same to *Crossweller*, and that it duly appeared to the said justice that the plaintiff had due notice of his order, and that due demand of the said sum of £3 : 4s. was made of the plaintiff, by *Crossweller*, but that the plaintiff refused to pay the same, the said justice did command the said constable and headborough to distrain the goods and chattels of the plaintiff, and if within the space of three days next after such distress by them made, the said sum of £3 : 4s., together with the reasonable charges of taking and keeping the said distress, should not be paid, that then the said constable and headborough should sell the said goods and chattels, so by them distrained, and out of the money arising from the sale thereof should pay the said sum of £3 : 4s. to *Crossweller*, returning the overplus, upon demand, to the plaintiff; which warrant the said justice caused to be delivered to the defendants, they being the constable and headborough of the said hundred of *Whalesbone*, in due form of law to be executed: By virtue of which warrant the defendants distrained the plaintiff's goods, and justly, &c. as for and in the name of a distress, for the said sum of £3 : 4s., so in arrear from him to *Crossweller*, as aforesaid: and this, &c., wherefore, &c. To this cognizance the plaintiff

pleaded in bar: *First*, that the defendants ought not, as bailiffs of the said justice, and as such constable and headborough as aforesaid, to acknowledge the taking, &c. Because, protesting that *Crossweller*, at the time of making his complaint, was not a labourer, as the defendants in their cognizance alleged: For plea, nevertheless, the plaintiff said, that at the time of *Crossweller's* making his complaint there was not due to him, as such labourer, from the plaintiff, the said sum of £3 : 4s., for wages, for work and labour done by *Crossweller*, for and in the service of the plaintiff. *Lastly*, a similar protestation that *Crossweller* was not a labourer, and that there was not due to him, as such, the said sum of £3 : 4s. from the plaintiff for wages. For plea, nevertheless, the plaintiff said, that *Crossweller* did not, on the said 29th day of *September*, 1817, duly make oath and swear before the said justice that the said sum of £3 : 4s. was justly due to *Crossweller* for wages for work and labour done by him, for and in the service of the plaintiff. Both these pleas concluded to the county, to which the defendants demurred, and the plaintiff joined in demurrer. The case came on for argument this day, when,

1819.

 WILSON
 v.
 WELLER.


Mr. Serjt. *Taddy*, in support of the demurrer, contended that the defendants were entitled to judgment on two grounds. *First*, that the magistrate had competent jurisdiction on this subject, and that his judgment was conclusive and final. *Secondly*, if he had not such jurisdiction, still that this was not the subject of an action of replevin. The jurisdiction to a magistrate to determine differences between masters and servants, is given by the 20th *Geq.* 2. c. 19. It is quite clear that this action is not maintainable, if the goods were distrained by virtue of the judgment of a court of competent jurisdiction. If, therefore, the magistrate had

1819.
 WILSON
 v.
 WELLER.

jurisdiction in this case, his judgment is conclusive. In *Rex v. Monkhouse* (a), the Court granted an attachment against an under-sheriff for granting a replevin of goods distrained on a conviction for deer-stealing, on the ground that the conviction was conclusive, and that its legality could not be questioned in a replevin. The conviction, in this case, is equally conclusive, it being founded on the statute of labourers. In *Rex v. Burchett* (b), an attachment was granted against a town-clerk, and a man who had been convicted on the game act; the former for granting, and the latter for suing out a replevin of goods distrained for the penalty. Though the information, in that case, was refused, it was solely on the ground that the Court would not interfere by information for a contempt of the inferior jurisdiction, which the replevin, in that case, was said to be. It may be contended, for the plaintiff, that the magistrate had no jurisdiction, because the oath of the party is essential to such jurisdiction; but by the 20 Geo. 2. c. 19, and preceding statutes, justices of the peace are empowered to adjust the wages of labourers, and it is not necessary to such jurisdiction that an oath should be made in the first instance. In the case of "*the Marshalsea*" (c), a difference was taken, when a court has jurisdiction of a cause, and proceeds *inverso ordine*, or erroneously: for there no action lies against the party who sues, or the officer of the Court who executes the process. But when the Court has no jurisdiction of the cause, there the whole proceeding is *coram non judice*, and actions will lie against them without any regard of the process; as if the Court of *Common Pleas* holds plea in an appeal of death, robbery, or any other appeal, and the defendant is attainted, it is *coram non judice*. "But if that

(a) 2 Str. 1184.—(b) 1 Str. 557.—(c) 10 Rep. 76. (a).

Court, in a plea of debt, awards *a capias* against a duke, earl, &c. which by the law doth not lie against them, and that appears in the writ itself; and if the sheriff arrest them by force of the *capias*, although the writ be against law, notwithstanding, inasmuch as the Court has jurisdiction of the cause, the sheriff is excused."—The preamble to the 20th Geo. 2. c. 19, recites that the laws then in being, for the better regulation of servants, and for the payment of wages to them and to artificers, handicraftsman, and labourers, were insufficient, and defective. Provisions as to the rating of wages had been made previously to the passing of that act, by the statutes 5 Eliz. c. 4, and 1 Jac. 1. c. 6, and those latter statutes having been productive of inconvenience, the first section of the 20 Geo. 2. c. 19. (a), makes a general pro-

1819.

 WILSON
 v.
 WELLER.

(a) By which it is enacted, That "all complaints, differences, and disputes, which shall happen or arise between masters or mistresses, and servants in husbandry, who shall be hired for one year, or longer, or which shall happen or arise between masters and mistresses, and artificers, handicraftsmen, &c. and other labourers, employed for any certain time, or in any other manner, shall be heard and determined by one or more justice or justices of the peace of the county, riding, city, liberty, town corporate, or place, where such master or mistress shall inhabit; although no rate or assessment of wages has been made that year by the justices of the peace of the shire, riding, or liberty, or by the mayor, bailiffs, or other head officer, where such complaint shall be made, or where such differences or disputes shall arise, which said justice or justices is and are thereby empowered to examine upon oath, any such servant, artificer, handicraftsman, &c. or other labourer, or any other witness, or witnesses, touching any such complaint, difference, or dispute, and to make such order for payment of so much wages to such servant, artificer, handicraftsman, &c. or other labourer, as to such justice or justices shall seem just and reasonable, provided that the sum in question do not exceed ten pounds, with regard to any servant, nor five pounds with regard to any artificer, handicraftsman, &c. or other labourer, and in case of refusal or non-payment of

1819.
 ~~~~~  
 WILSON  
 v.  
 WELLER.

vision for wages, without any particular assessment. No oath is required by the 5 *Eliz.* and 1 *Jac.* 1; and where an oath is introduced in a statute, as essential to the jurisdiction, it is always expressly declared. This section gives a general jurisdiction to a magistrate to determine disputes between masters and labourers, and merely empowers such magistrate to examine on oath, but does not make it an indispensable condition for him to do so; and his having a jurisdiction, the order made by him is conclusive. An examination on oath is not essential to the jurisdiction by the first section of the statute, though it may be on the subsequent clauses. The magistrate, therefore, having competent jurisdiction, the goods of the plaintiff might be distrained and sold. But this action is not maintainable, whatever the proceedings might have been that took place before the magistrate, for replevin lies only for a distress for rent, arrear, amercements, &c.: but here the distress and sale was in the nature of an execution. It has been held (*a*), that the rule of common law, which exempts implements of husbandry and other articles from distress, does not extend to cases, where a distress is given in the nature of an execution by any particular statute, as for poor's rates. The nature and essence of the action of replevin is to have the goods distrained re-delivered. But this is in the nature of an execution directed to be levied by distress and sale; and, therefore, judgment *pro retorno habendo* cannot be

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any sums so ordered, by the space of one and twenty days next after such determination, such justice and justices shall and may issue forth his and their warrant to levy the same by distress and sale of the goods and chattels of such master or mistress, or person employing such artificer, handicraftsman, &c. or other labourer, rendering the overplus to the owners, after payment of the charges of such distress and sale."

(*a*) *Anonymous*, 3 *Salk.* 136.

awarded. Goods are only repleviable where they have been taken by way of distress; Lord *Coke*, therefore (a), defines replevin to be a remedy grounded upon a distress being, (as he says) a re-deliverance to the first possessor of the thing distrained, on security given by him to try the right, and to re-deliver the distress, if judgment shall be against him. On both grounds, therefore, the defendants are entitled to judgment.

1619.  
  
 WILSON  
 v.  
 WELLER.

Mr. Serjt. *Oslow*, for the plaintiff, premised, that the defendant's cognizance did not deprive him of his right of action; that the jurisdiction now sought to be established is unknown to the common law, and that a magistrate is not empowered by the 20 *Geo. 2. c. 19*, to examine parties otherwise than on oath. By the first section of that statute, a magistrate may regulate disputes between masters and labourers, and is empowered to examine on oath, and by the three following sections he is directed so to do: the first clause, therefore, cannot be separated from those which succeed it. In order to establish the proposition contended for the defendants, it must be inferred, that it is altogether immaterial whether an oath be duly administered before a magistrate or not. In this case, two oaths were necessary; the one for the execution of the summons, which should have been made in the presence of the person summoned; the other for the hearing of the complaint before the magistrate. The words, "duly empowered," merely shew that the magistrate may and ought to administer an oath in the presence of the parties. It has been contended, for the defendants, that this action is not maintainable, and *Re v. Monkhouse* has been relied on in support of this position; but that case was in effect overruled in *Milward*

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(a) *Co. Lit.* 145, (b.)

1819.  
 WILSON  
 v.  
 WELLER.

v. *Caffin* (a), where it was held, that a distress for a poor's rate for land not in the occupation of the plaintiff might be replevied, notwithstanding the sessions on appeal had confirmed the rate; their determining that a man being assessed for what he did not occupy being an excess of jurisdiction.—[Lord Chief Justice Dallas.—That case is distinguishable: there the overseers rated lands not in the occupation of the plaintiff; here the magistrate had jurisdiction to hear and determine complaints brought before him.] *Fletcher v. Wilkins* (b), is similar in principle to the present, and it was there held, that the 24 Geo. 2. c. 44. s. 6, did not extend to a replevin. It has been said, that this being a warrant for distress and sale, that if the goods were sold there could be no judgment for a return, but the value of the goods might be found by a Jury, and the Court might award the value without a return of the goods. But in this case the cognizance is clearly bad, for by the statute a magistrate is not empowered to issue his warrant to levy by distress till twenty-one days have elapsed from the demand, and there must be also a refusal to pay; and it does not appear by the cognizance, either by reference or averment, that twenty-one days had elapsed, as every date is laid under a *videlicet*.—[Mr. Justice Richardson. The cognizance is sufficient in that respect: it must be inferred, that more than twenty-one days had elapsed between the adjudication and the issuing of the warrant.] In *Fenton v. Boyle* (c), it was held, that the writ of replevin was not taken away by the highway act for a distress made under its provisions, and the Court there refused to set aside the proceedings. The magistrate here had no jurisdiction, by the 20 Geo. 2. c. 19, to ex-

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(a) Sir W. Bl. 1330.—(b) 6 East, 283.—(c) 2 New Rep. 399.

amine without oath, and the plaintiff is therefore entitled to recover.

1819.  
 WILSON  
 v.  
 WELLER.

Mr. Serjt. *Taddy*, in reply, observed that the oath mentioned in the first section of that statute was not necessary to give the magistrate a jurisdiction to examine the parties. That the case of *Milward v. Caffin* was determined solely on the ground of an excess of jurisdiction, and that *Fletcher v. Wilkins* was inapplicable to the present point, as here the magistrate exercised his judgment, having full jurisdiction to do so. That the case of *Rex v. Monkhouse* had never been impeached, and that this action therefore was not maintainable.

Lord Chief Justice DALLAS.—I entertain no doubt whatever on this case. The question is, whether the magistrate had a jurisdiction; and I am of opinion that he had a jurisdiction, on complaint made to him on oath, to inquire whether a servant had wages due to him from his master. He has therefore heard and determined the complaint, in the present instance, on the jurisdiction afforded him by the 20 Geo. 2. c. 19, by having duly summoned the parties before him. This case is wholly distinguishable from that of *Milward v. Caffin*, as there the overseers of the poor rated a person on lands which he did not occupy, and it was consequently held an excess of jurisdiction; but here the magistrate had a competent jurisdiction given him by statute, which he has very properly exercised. I therefore think that the defendants are entitled to judgment.

Mr. Justice PARK, and Mr. Justice BURROUGH, concurred.

1819.  
WILSON  
v.  
WELLER.

Mr. Justice RICHARDSON.—Independently of the cases that have been cited, there is another authority to shew that this action cannot be maintained. In *Bradshaw's* case (a), it was ruled that when a statute orders a distress and sale of goods, it is in the nature of an execution, and that replevin does not lie; but that if the sheriff had granted one, yet, that it is not such a contempt as for an attachment to be granted against him, on the ground that the jurisdiction of the magistrate should not be questioned in a collateral way. In this case it is provided by the 6th section of the 20 *Geo. 2. c. 19*, that no *certiorari* shall issue to remove any proceedings had in pursuance of that act. It might as well therefore be contended that replevin would lie for goods seized by warrant of a magistrate, on a conviction for the destruction of game. It is not necessary in all cases to examine the parties on oath; but here the magistrate was fully empowered to do so. I am therefore of opinion that this action is not maintainable for the purpose of examining whether the magistrate had a competent jurisdiction or not.

Judgment for the defendants.

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(a) *Bac. Abr. Replevin, C.*

KNIGHT, and others v. DORSEY.

Thursday,  
May 13.

MR. Serjt. *Copley* on a former day in this term had obtained a rule *nisi*, that an *exoneretur* might be entered on the bail-piece in this cause, and that the defendant might be at liberty to enter a common appearance, on the ground of a variance between the declaration and the affidavit to hold to bail. The affidavit stated that the defendant was indebted to the plaintiffs in the sum of £150, for the price of a vessel, of and belonging to the plaintiffs, without stating that it was hired by the defendant. The declaration did not contain any count for the price of the vessel, but merely counts on an alleged breach of contract, in the defendant's not having hired the vessel according to an agreement entered into between him and the plaintiffs.

It is too late for a defendant to move to enter an *exoneretur* on the bail piece, on the ground of a variance between the declaration and the affidavit to hold to bail, after bail have justified, a plea has been demanded, and time for pleading allowed.

MR. Serjt. *Lens* now shewed cause on affidavits which stated that the defendant was arrested, by virtue of the above affidavit, on the 8th of *April* last. That bail were justified on the 3d of *May*, and that on the 4th a declaration in chief was delivered, which contained no counts for the hire of the vessel, but only counts for an alleged breach of contract, with the usual money counts. That a plea was demanded on the 5th, and that on the 7th, the defendant obtained an order for four days' time to plead on the usual terms, on which day the present rule was obtained. Under these circumstances the learned Serjeant submitted that the defendant had waived his right to object to being held to bail, by not

1819.  
KNIGHT  
v.  
DORSET.

having made his application sooner. He relied on *Chapman v. Snow* (a), where a defendant, having perfected bail, and a plea had been demanded, was held to waive all objections to the sufficiency of the affidavit on which he was held to bail. So in *D'Argent v. Vivant* (b) it was held that any irregularity in the affidavit to hold to bail must be taken advantage of in the first instance, and is waived by the defendant's putting in bail. Here bail were not only put in, and a plea demanded, but the defendant had obtained an order for time to plead before the present rule was applied for.

Mr. Serjt. Copley, in support of the rule, submitted that the defendant had applied as early as he possibly could; the case of *Chapman v. Snow*, was distinguishable from the present, as there, there was no variance between the declaration and the affidavit to hold to bail, and there had been a delay by the defendant of twelve days before the application was made. But,

*Per Curiam*.—This application is clearly too late. The defendant ought to have applied at the earliest moment.

Rule discharged.

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(a) 1 Bos. & Pul. 132.—(b) 1 East, 330.

## RICHARDSON v. HALL.

Thursday,  
May 13.

THIS was an action of *assumpsit* for the use and occupation of a house at *Margate*. The declaration stated, that on the 1st of *April*, 1818, the defendant was indebted to the plaintiff in the sum of £50 for the use and occupation of a house situate, &c. and held and occupied by the defendant, and at his request, and a promise by him alone to pay. There were also counts for goods sold and delivered to the defendant, and the usual money counts. At the trial of the cause before Mr. Justice *Bayley*, at the last assizes at *Maidstone*, the plaintiff claimed £15, for three quarters of a year's rent from *Lady-day* to *Christmas*, 1817, as well as £15 for fixtures, both which sums were due from the defendant's wife previously to her marriage with him, under the following circumstances: The defendant married on the 8th of *June*, 1817, up to which time his wife rented and lived in the house in question, which she had taken of the plaintiff at the yearly rent of £20, payable half-yearly; and the third year of her occupation would have expired at *Michaelmas*, 1817. The defendant kept a separate house of his own, and never occupied or paid rent for that held of the plaintiff by his wife; and, shortly after the marriage, his wife left the plaintiff's house, and resided with the defendant. The wife paid the plaintiff a half-year's rent to *Lady-day*, 1817, the day on which it became due, and at the same time gave him notice to quit at the ensuing *Michaelmas*, which was accepted. The plaintiff took the key on the 10th of *June* preceding, and put up a bill to let the house. It was submitted that the plaintiff was not entitled to recover, on the ground that the wife ought to have been joined in the

An action of *assumpsit* for the use and occupation of a house is not maintainable against the husband alone, if his wife held under a yearly tenancy before marriage, the rent being payable half-yearly, where part of such rent was due from the wife *dum sola*, and the remainder accrued after the coverture.



1819.  
  
 RICHARDSON  
 v.  
 HALL.

action; but (the notice to quit having been duly proved) the learned judge was of opinion that the defendant was liable, in respect of the privity of estate, for the half-year's rent due at *Michaelmas*, 1817. A verdict was accordingly taken for the plaintiff, damages £10, being half a year's rent due at that time; but the point was reserved for the consideration of the Court, whether the contract, having been made with the plaintiff by the wife before marriage, she ought not to have been joined with the defendant in this action.

Mr. Serjt. *Copley*, on a former day in this term, obtained a rule *nisi*, that this verdict might be set aside, and a nonsuit entered on the objection raised at the trial, and relied on the cases of *Mitchinson v. Hewson* (a) and *Drue v. Thorne* (b). He submitted that, as the rent in question was payable half yearly, that it was entire, and could not be divisible, and that, as it began to run from *Lady-day*, and nearly a moiety of the half-yearly payment had accrued at the time of the marriage, that the defendant could not alone be liable. He cited *Codyn's Digest* (c), where it is said, that "if a woman, lessee for life, takes husband, and dies, the husband shall be charged for rent incurred during the coverture; for he takes the profits of the land out of which the rent issues, so for rent incurred during the coverture, upon a lease for years." Here the marriage took place in the middle of the half-year, and as the rent was payable half-yearly, the entire portion did not accrue during the coverture. *Naish v. Tatlock* (d) is expressly in point, where it was held that assignees of a bankrupt who enter in the middle of a year, upon premises occupied by the

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(a) 7 T. R. 348.—(b) *Alcyn*, 72.—(c) *Baron and Feme*, 2 B.—(d) 2 H. Be. 319.

bankrupt as tenant from year to year, are not liable in an action for use and occupation for the bankrupt's previous occupation, unless it can be proved to have been permitted at their special request.

1819.  
 RICHARDSON  
 v.  
 HALL.

Mr. Serjt. *Lens* subsequently shewed cause. The learned Judge at the trial thought that the defendant was liable in respect of the privity of estate, and that consequently he ought to be sued alone; and that opinion is supported by a number of authorities. Whatever obligations the wife had entered into that were perfect before marriage, she would be liable for; but here the contract was imperfect, for the promise to pay rent must be connected with the occupation of the house; and though she took the house, and promised to pay the rent, before her marriage, yet no rent had accrued at the time of the marriage, as it would not become due until the *Michaelmas* following, when her husband was the only person responsible. Though the promise to pay was made by the wife before, still it was not concluded till after the marriage. On principle, therefore, this action is properly brought. No liability to pay the rent in question attached to the wife *dum sola*. There is an express authority as to this point. In *Comyn's Digest* (a) it is laid down, that "debt lies against the husband alone, for rent incurred during the coverture, upon a lease to the wife *dum sola*;" and *Thomson's Entries* (b) is referred to in support of that position. So it is said (c), that an action on an *assumpsit* by husband and wife, against both is bad, for *quoad* the wife the promise is void (d). Though the original promise to pay was made by the wife *dum sola*, yet there was no effectual debt till after the marriage, which therefore was incurred during the coverture.

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(a) *Baron and Feme*, Y.—(b) 117.—(c) *Com. Dig. Baron and Feme*, Y.—(d) *Palmer*, 313.

1819.  
 {  
 RICHARDSON  
 v.  
 HALL.

Mr. Justice RICHARDSON.—There is a difficulty in this case which has not yet been alluded to. It is an action for use and occupation by the husband, and brought against him alone, in which he is charged on account of rent, part of which accrued for the occupation of the premises by the wife before marriage; and the declaration states the occupation to have been at the request of the husband alone. It may be necessary to consider the cases referred to by my brother *Copley* when he obtained this rule, and see how they bear on the present question. It may be also worthy of remark, that the action of *assumpsit* for use and occupation is not co extensive with that of debt for rent.

Adjournatur.

Mr. Serjt. *Lens* on this day resumed.—*Naish v. Tatlock* (a) is the leading case as to this question, where it was decided that the lessor of a house could not maintain an action for use and occupation against the assignees for the bankrupt's occupation as well as their own, without proving their *special instance and request* for the bankrupt to occupy during the time that elapsed before his bankruptcy. That case merely shews that the request is material; but the foundation of the decision there, rested on the ground that assignees are not liable in their own character, unless they occupy themselves, or adopt the occupation of the bankrupt. Assignees can only become liable by a voluntary adoption; but a husband, by the act of marriage, becomes immediately answerable for all the debts and contracts entered into by the wife *dam sola* and remaining unsettled at the time of the marriage. The law throws upon the husband the effect of the occupation, though he did not make the promise with the landlord to occupy. In *Mitchinson v. Hewson* (b) and

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(a) *H. B. C.* 319.—(b) 7 *T. R.* 348.

*Drue v. Thorne* (a), the debt was complete before the marriage, and the liability of the wife would have continued in case she had survived her husband. [Mr. Justice RICHARDSON.—If rent accrue on a demise after marriage, might not an action of debt be maintained against husband and wife?] Such action might be brought against the husband alone. If it were commenced against both, the wife would be liable in case she survived her husband. If a debt be perfected during the coverture, the husband alone is liable. [Mr. Justice BURROUGH.—How can this be an occupation by the husband before marriage? Debt might be maintained whereby an action accrued, or the plaintiff might have declared that the wife occupied the house *dum sola*, that during the term she married, and that the husband became the occupier after marriage, when the rent became due; but here the plaintiff has declared that the husband occupied the premises during the whole time, which is contrary to the fact.] It is not necessary that the husband should be in the actual occupation, for then even a joint action against husband and wife could not be maintained, where the wife had occupied during part of the time, and the husband during the remainder, for there could be no joint occupation for the whole time. When the rent became due, the husband alone was responsible. The law created a privity of estate between the husband and wife. The rent cannot be severed; although part of it accrued before marriage, still it was not perfected till afterwards; and it could not be due in one right up to, and in another after, the marriage. But occupation is a secondary object; for, if a house be burnt down, the tenant is liable for the rent accruing afterwards, in an action for use and occupation, *Baker v. Holtzraffell* (b). In *Mitchinson v.*

1819.  
  
 RICHARDSON  
 v.  
 HALL.

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(a) *Aleyn*, 72.—(b) 4 *Taunt.* 45.

1819.  
 RICHARDSON  
 v.  
 HALL.

*Hewson*, the debt was perfected before marriage; here it was not completed till afterwards.

Mr. Serjt. *Copley*, and Mr. Serjt. *Taddy*, in support of the rule, insisted that occupation was not a secondary consideration. If a house be burnt down, the party holding is liable in respect of the land on which the house stood. The declaration here states an occupation by the husband alone, and at his request, which is contrary to the fact, for there was no occupation of the husband before marriage, neither was it at his request, because no interest accrued to him till the marriage took place. The contract was made with the plaintiff by the wife *dum sola*. The case of *Naish v. Tatlock* establishes, that if a party be sued for the occupation of another, it must appear that such occupation was at the defendant's request. There is a great confusion in the cases as to where the husband and wife are to be joined or sued alone. This was an occupation partly by the wife and partly by the husband. If the whole of the rent had accrued during the coverture, there would have been no doubt. In *Comyn's Digest* (a) a reference is made to *Thomson's Entries* (b); but that does not bear out the proposition of the Chief Baron, as that was an action of debt on a lease for years, and the whole of the rent accrued after the marriage. The action of debt for rent arises not only from the contract but the occupation; but *assumpsit* for use and occupation lies for the occupation alone. The 14 sect. of 11 Geo. 2. c. 19 warrants this position. It is therefore necessary to prove what was held and enjoyed, and at whose request the occupation was permitted. Here the wife alone entered into the contract, and occupied for more than three months before the marriage;

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(a) *Baron and Feme*, Y.—(b) 117.

the allegation, therefore, of the occupation at the request of the husband cannot be proved nor established.

1819.  
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 RICHARDSON
 v.
 HALL.

Lord Chief Justice DALLAS.—We are of opinion that the husband is not liable in this form of action, and shall not now inquire whether he would be liable in one of a different description. This is an action for use and occupation, given by the statute 11 *Geo. 2. c. 19*, by which the actual occupation or enjoyment is made the measure of the damages, and the plaintiff can only recover from the person against whom the action is brought. Here, the premises were occupied by the wife before marriage, and the demise was originally made to her. The letting was at her request, and not at the instance of the husband. In *Naish v. Tatlock* the words *special instance and request* were held to be words of substance, and not of form. The distinction raised by my Brother *Lens* in the course of his argument is perfectly just, *namely*, that the assignees of a bankrupt can be only liable on their own express occupation or request, and not on a part occupation by the bankrupt; but it has been said that here the husband is liable for the part occupation of his wife before marriage, because by the act of marriage he becomes answerable for the contracts entered into by her *dum sola*. Though this be a distinction in fact, it is not in principle, because here, the request is matter of substance and not of form. In *Naish v. Tatlock*, Lord Chief Justice *Eyre*, in delivering the judgment of the Court, said (a), “A reasonable satisfaction for the use and occupation is the thing intended to be given by the statute; the form of action marked out (being enlarged by a necessary construction, so as to be allowed to be maintained without an express promise), is the proper

(a) 2 *H. Bl.* 323.

1819.
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RICHARDSON
v.
HALL.

form in which such reasonable satisfaction is to be recovered; but the reasonable satisfaction, which in its own nature must apply to something specific, by which it can be estimated, being here given for use and occupation, and for nothing else, it is a remedy which in its own nature is not co-extensive with a contract for rent, nor does it seem to have been within the scope and purview of the act to make this remedy co-extensive with all the remedies for the recovery of rents, claimed to be due by the mere force of the contract for rent. The statute meant to provide an easy remedy in the simple case of actual occupation, leaving other more complicated cases to their ordinary remedy;" and his Lordship added, "In the case then under consideration, the plaintiff must be left to such other remedy as she might be advised to pursue, that she could not recover in an action for use and occupation without proof of the use and occupation alleged; and if she could recover at all in that form of action, against one man for use and occupation by another (as to which the Court gave no opinion), it must be upon the ground of that occupation having been permitted at his request, and that request must be proved." Here, the former part of the occupation was by the wife *dum sola*, and not by the husband; she alone was in the actual possession of the premises before marriage, and no request was ever made by the husband. The averment of such request in the declaration has not been proved: without such proof the plaintiff cannot recover; and I therefore think that this action is not maintainable.

Mr. Justice PARK.—I am of the same opinion. I abstain from saying whether the plaintiff has any other mode of remedy, but confine myself to his not being entitled to recover in this form of action. In the case of *Baker v. Holtpzaffell*, though the house was burnt down,

still the tenant held and enjoyed the land, and it was therefore decided that he was liable, as he had made no offer to deliver it up to his landlord; and I perfectly coincide with the argument adopted for the defendant, *namely*, that there can be no apportionment of rent.

1819.

 RICHARDSON
 v.
 HALL.

Mr. Justice BURROUGH.—The declaration in this case is framed in the usual and ordinary way, as in an action for use and occupation. It is quite clear that there was no occupation by the husband before marriage, either in fact or law. It is equally so, that by the act of marriage the contracts of the wife are charged on the husband, although he be a perfect stranger to them before the marriage takes place. The rent here was entire, and could not be recovered unless the whole were due. The request depends on the subject matter; and the words "*special interest and request*," are words of substance, and are material in this case. It was so held in *Naish v. Tatlock*; and it is equally necessary that it should be proved here, for the request cannot apply to a time when the wife and husband were in point of law strangers, and when the latter had no right to, or enjoyment of the premises. There was no request by the defendant to occupy, and no right whatever accrued to him till marriage. I will not say, that if a declaration had been framed according to the facts, that an action for use and occupation might not be maintained. If debt had been brought, the plaintiff's declaration might have stated the occupation by the wife before marriage, and that a demand of money was made on the husband for rent accruing after marriage, in which action I think the plaintiff might have recovered.

Mr. Justice RICHARDSON.—I am also of opinion that the present action cannot be maintained; but I abstain

1819.

RICHARDSON

v

HALL.

from saying what other remedy the plaintiff might have adopted. The decision of this Court, in *Naish v. Tatlock*, is an express authority to shew that the remedy to be obtained by an action of use and occupation is not co-extensive with the action of debt for rent. The words of the statute, giving the remedy by the former action, form the material distinction; for the statute gives a simple and collateral remedy, by way of compensation from the person who is in the actual holding of the premises. Here, the defendant was only in the actual possession from the time of his marriage till the expiration of the half year, therefore, there was no occupation, as averred in the declaration, for that part of the half year previous to his marriage. If no marriage had taken place, or the wife had sold her interest on the day she married, an action similar to the present could not be maintained against a vendee for her occupation, for he would have been a stranger. My Brother *Lens* has contended that the husband has a different relation to a stranger; but the husband here was a stranger to the occupation of the wife before marriage. Although the husband is in general jointly liable for contracts entered into by the wife *dum sola*, yet the occupation by her in this case before marriage is precisely the same as if the premises had been occupied by a stranger. No injustice will follow by saying, that this action is not maintainable, as the plaintiff may have recourse to some other remedy.

Rule absolute.

ARNOLD v. EDWARDS, a prisoner.

Friday,
May 14.

Mr. Serjt. *Lawes* opposed the discharge of the defendant out of the custody of the warden of the *Fleet*, on affidavits which stated that he had fraudulently assigned his property, and that on his petitioning the Insolvent Debtors' Court for his discharge, he was remanded to prison on that ground. The learned Serjeant now applied for leave that he be examined on interrogatories under the 33 *Geo. 3. c. 5. s. 5 (a)*, and observed, that a similar application had never been made here, and that the rule of *Easter 36 Geo. 3*, in the *King's Bench*, did not extend to this Court.

The Court will order interrogatories for the examination of a defendant in custody by one of the secondaries, which interrogatories must be filed with him.

The Court on hearing the affidavits read by the secondary, ordered interrogatories to be filed with him, and that the defendant should be examined on them by one of the secondaries, and brought up to answer on the second day of next term.

(a) By which it is provided, That it shall be lawful for any creditor or creditors, at whose suit any debtor shall be in execution under that statute, to file interrogatories for the examination of such prisoner, before his or her being admitted to take the benefit of that or the 32 *Geo. 2. c. 28*.

Friday,
May 14.

ANONYMOUS.

Bail about to justify by affidavit were described in the notice "as of the town and county of the town of *Nottingham*."—*Held*, too general, and that the street in which they resided should have been inserted in the notice; and that new bail could not be substituted, as the former were brought up under a rule and not a notice.

ONE of the bail in this case, who was about to justify by affidavit, was described in the notice, as "of the town and county of the town of *Nottingham*."

Mr. Serjt. *Cross* insisted that the description was insufficient, as *Nottingham* was one of the most populous manufacturing towns in the north of *England*, and that the name of the street in which the bail resided should have been inserted in the notice.

The Court concurred in thinking the description too general, and gave four days time for further inquiry, and the Lord Chief Justice observed, that the objection was well founded, as the party who gave the notice knew the street in which the bail resided, and therefore it ought to have been inserted in the notice. On a subsequent day, another new bail was substituted for the one described, as of *Nottingham*; but the Court would not permit him to justify, as the bail were brought up under a rule, and not a notice, and that by the rule the same bail only could justify.

Justification refused.

FOWLER v. The Men inhabiting within the hundred of
LONINGBOROUGH, in the county of KENT.

Friday,
May 14.

THIS was an action on the statute of 9 *Geo. 1. c. 22 (a)*. The notice required by the stat. 9 *Geo. 1. c. 22. s. 8.* to be given to the inhabitants of a hundred, for damage sustained by the burning the plaintiff's barn, must be given to such inhabitants, previous to the party's examination on oath before the magistrate.

The declaration stated that some person or persons, to the plaintiff unknown, within one year last past, to wit, on the 11th of *October*, 1817, at the parish of *Alham*, within the hundred of *Loningborough*, in the county of *Kent*, with force and arms, unlawfully, wilfully, maliciously and feloniously set fire to a certain barn there situate, then in the tenure and occupation of the plaintiff, and containing divers, to wit, 5000 quarters of corn, therein being, and then and there being the property of and belonging to the plaintiff, and of the value of £200, whereby the said barn and corn became and were burnt, destroyed and consumed, against the peace of our Lord the King, to the great damage and injury of the plaintiff, and against the form of the statute in that case made and provided, whereby the plaintiff sustained damage to the amount of £200; and that thereupon the plaintiff within two days next after the committing of the said offence, and after such damage and injury were done to him, by such offender or offenders as aforesaid, to wit, on the 13th day of *October*, in the year aforesaid, in the parish aforesaid, in the county aforesaid, did give notice of such offence so done and committed as aforesaid, to divers inhabitants of the town and parish of *Alham* aforesaid, in the said county, being a town near

(a) Made perpetual by 31 *Geo. 2. c. 42*.

1819.

FOWLER

v.

The Inhabit-
ants of LO-
NINGBOROUGH.

unto the place where the said offence was so committed, and such damage and injury were so sustained as aforesaid, according to the form of the statute in that case made and provided, and that heretofore, and within four days next after the committing of the said offence, and after such damage and injury were done to the plaintiff by such offender or offenders as aforesaid, to wit, on the said 18th day of *October*, in the year aforesaid, at *Alham* aforesaid, in the county aforesaid, one *Godfrey Fawcett Westfield*, then and there being the servant of the plaintiff, and having the care of the said barn and corn therein being at the time the same were set fire to and burnt as aforesaid, in further pursuance of the said statute, did give in his examination upon oath before *T. P. Esq.*, then and there being one of his Majesty's Justices assigned to keep the peace of our said Lord the King in and for the said county of *Kent*, and also to hear and determine divers felonies, trespasses, and other misdemeanors committed within the said county, and then inhabiting within the said hundred where the said fact was committed, and was then and there examined by and before such Justice upon his corporal oath of and concerning the premises; and upon such examination, he the said *G. F. Westfield*, then and there at *Alham* aforesaid, upon his oath aforesaid, said that the said barn was unlawfully and maliciously set on fire, by some evil disposed person or persons, and that he did not know the person or persons who committed the said act of setting fire to the said barn, or any or either of them; and the plaintiff further said, that since the committing of the said offence, six months or more have elapsed and expired, and that neither the said offender or offenders who so committed the said offence, nor any nor either of them, have in the space of the said six months next after the committing of the said offence, or at any time since, been apprehended

for, or lawfully convicted of the said offence: Nevertheless, the defendants, not regarding the statute in that case made and provided, have not, nor have any or either of them (although they were afterwards, to wit, on the 1st day of *May*, in the year of our Lord 1818, at the town and parish aforesaid, in the county aforesaid, requested by the plaintiff so to do) as yet made full satisfaction and amends, or any satisfaction or amends whatsoever to the plaintiff for the damage by him sustained by the burning of the said barn and the corn therein contained as aforesaid, but have hitherto wholly neglected and refused so to do.

The defendants pleaded not guilty.

1819.
 FOWLER
 v.
 The Inhabitants of LONINGBOROUGH.

At the trial of the cause, before Mr. Justice *Bayley*, at the last assizes at *Maidstone*, the plaintiff, in order to prove the facts, as stated in the declaration, put in evidence the written examination of his servant, taken on oath, before one of the magistrates inhabiting within the hundred, and dated on the 13th *October*, 1817, which stated, "that upon *Saturday* the 11th day of *October* instant, some person or persons did *feloniously and maliciously* set fire to a certain barn wherein was deposited a quantity of corn belonging to the plaintiff, situate in the town and parish of *Alham*, in the hundred of *Loningborough*, within the lath of *Shepway* in the county of *Kent*, which barn was under the care of the examinant. And the examinant further swore, that such *person or persons* was or were unknown to him." This examination was signed by the servant. It was further proved, that this examination was taken at about three o'clock, on the 13th of *October*, and that the notice as required by the statute was served on two of the inhabitants between four and six o'clock in the evening of the same day, when the learned Judge was of opinion that the

1819.
 FOWLER
 v.
 The Inhabit-
 ants of Lo-
 NINGBOROUGH.

notice should have preceded the examination, in order that the inhabitants might have attended such examination. For the defendants it was further objected, *first*, That the examination was insufficient, as it did not negative that the examinant knew *any of the persons* that committed the offence, but only that *such person or persons* were unknown to him; and in support of this objection, the case of *Thurtell v. The hundred of Mutford (a)*, was relied on: *Secondly*, That there was a variance between the examination, and the declaration, as in the examination it was stated that the barn was feloniously and maliciously set on fire, and the declaration in setting out the examination, stated the barn to have been *unlawfully* and maliciously set on fire, omitting the word *feloniously*: *Thirdly*, That the declaration, in setting out the examination, states that the examinant did not know the person or persons, *or any or either of them*, whereas these latter words are omitted in the examination. *Fourthly*, That the word *barn* is omitted in the statute; and, *fifthly*, that it is not stated in the declaration in setting out the examination, that the plaintiff's servant had the care of the barn. The jury, however, found a verdict for the plaintiff, damages £135, with liberty for the defendants to move to set it aside, and that a nonsuit might be entered.

Mr. Serjt. *Vaughan* having obtained a rule *nisi* for this purpose, Mr. Serjt. *Lens* now shewed cause, and premised that there was no validity in either of the objections, and that the only material point to be considered was, whether the notice should not have preceded the examination, in order to comply with the requisites of

9 Geo. 1. c. 22. s. 8 (a). The true answer is, that if it should have been thought convenient to make such a regulation, yet that there was nothing in that clause to shew that it was necessary that the examination should take place four days after such notice. The existence of the notice is all the statute requires. The examination may take place before any magistrate within the hundred, and it is not necessary to declare the name of such magistrate. The statute requires no notice of the time when the examinant is to attend for this purpose. The examination is merely a written narrative or declaration of the party. If it take place within six days after the offence is committed, it is sufficient to comply with the statute, and the notice may be given at the same time. The oath must be made before the expiration of six days from the time the offence is committed; but if it can be done within two days, it would be a sufficient compliance with the statute. It may be made before any magistrate of the county, and it is not expressed at what time it shall be taken. If the offenders were known, the notice would not only be unnecessary but nugatory. The 8th section of the statute relates to the notice being restrictive, it may be given instantly, or at

1819.

FOWLER
v.The Inhabit-
ants of Lo-
NINGBOROUGH.

(a) By which it is provided, "That no person shall be enabled to recover any damages by virtue of that act, unless within two days after such damage done him by any such offender, &c. he shall give notice of such offence unto some of the inhabitants of some town &c. near the place, &c., and shall within four days after such notice give in his examination upon oath, or the examination upon oath of his servant, &c. who had the care of his house, &c. before any justice of peace of the County, &c. inhabiting within or near to the hundred where the said fact was committed, *whether he knew the person or persons that committed such fact, or any of them, and if upon such examination it be confessed, that he did know the person, &c. that then he so "confessing," should be bound by recognizance to prosecute such offender, &c.*"

1819.
 FOWLER
 v.
 The Inhabit-
 ants of LO-
 WINGBOROUGH.

any time within the space of two days, from the expiration of either of which periods the party has four days to give in his examination on oath. No discussion takes place before the magistrate on the examination, and if it were written he must receive it, and could not cross-examine the party, for it is in strictness merely a deposition or narrative; nothing is to be done before the examination be given in, and if the examination must take place within four days after the notice, it would impose a greater restriction than the statute intended. The learned Serjeant was proceeding with his argument on the second point, when

Mr. Serjt. *Vaughan* having stated that he should confine himself solely to this,—was stopped by the Court.

Lord Chief Justice DALLAS.—The only question to be considered in this case is, not what the statute of the 9th *Geo.* 1. ought to have expressed, but what it has in terms enacted, and if its construction be clear, the Court cannot put on it a doubtful interpretation. By the 8th section of the statute, it is provided, that no person shall be enabled to recover any damages by virtue of the act, unless within two days after such damage, he shall give notice of such offence unto some of the inhabitants of some town near the place, and shall within four days *after such notice* give in his examination upon oath before any magistrate inhabiting within or near to the hundred where the fact was committed. Here the examination took place before the notice, and unless we can construe the word *after* to mean *before*, or give it no meaning, the statute has not been complied with.

Mr. Justice BURROUGH.—How could the inhabitants

attend the examination, unless they had previous notice when it was to take place. The examination was in itself important, because the examinant must make oath whether he knew the persons who committed the offence, and by the ninth section where any of the offenders shall committed within six months after the offence committed the hundred is not liable.

1819.
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 FOWLER  
 v.  
 The Inhabit-  
 ants of Lo-  
 NINGBOROUGH.

Mr. Justice PARK, and Mr. Justice RICHARDSON,  
 concurred.

Rule absolute.

JENKINS v. MASON.

Monday,  
 May 17.

Mr. Serjt. Copley, on a former day, obtained a rule *nisi*, that the writ of *feri facias*, issued in this cause, and the execution had thereon, should be set aside with costs, and that the goods and chattels levied under the same should be restored to the defendant, on an affidavit of the defendant's which stated that he had been discharged under the 53 Geo. 3. c. 102. s. 14.

An affidavit, stating that the defendant had been discharged under an Insolvent Debtors' Act, cannot be sworn before his own attorney in the cause.

Mr. Serjt. Pell now shewed cause, and took a preliminary objection to the affidavit, as it appeared to have been sworn before the attorney of the defendant *in the cause*, and observed, that by a rule of this Court (a), an affidavit sworn before the attorney in the cause, could not be read, except for the purpose of holding the defendant to bail, or entering an appearance. That in *Read v. Cooper* (b), where a similar objection was made, Lord

(a) *Easter*, 13 Geo. 2.—(b) 5 *Taunt.* 89.

1819.  
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 JENKINS
 v.
 MASON.

Chief Justice *Gibbs* said, that "if he was not the attorney on the record, it would not vitiate." That at all events it was incumbent for the defendant to shew that the attorney, in this instance, was not the attorney on the record.

Lord Chief Justice DALLAS.—I think this case is within the rule of 13 *Geo. 2.* In *Read v. Cooper*, it appeared that the affidavits were sworn before the defendant's own attorney in the country. Here it is stated that the affidavit was sworn before the attorney in the cause; I therefore think he has an interest in the event of the cause, but that under the circumstances the rule should be
 Discharged without costs.

Monday,
 May 17.

ANONYMOUS.

A recovery may be amended by adding a parish, though the recovery was suffered nearly a century ago, if there be general words in the exemplification, and deed to make the tenant to the præcipe, to warrant the insertion of such parish.

MR. Serjt. *Vaughan* moved to amend a recovery by adding the word *Birmingham*, after the parish of *Salt-sleigh*. The recovery was suffered nearly one hundred years since, and he relied on the case of *Tennyson*, demandant; *Goulton*, tenant; *Rousby*, vouchee (a); to shew that the application might be made at this distance of time. He grounded his motion on a statement that the property intended to pass by this recovery was purchased by Sir *C. Holt*, nearly a century ago, and that the present occupiers had been forty years in possession. That in the exemplification of the recovery the premises were described as lying in *Aston-juxta*

(a) 3 *Taunt.* 408.

Birmingham; and that in the deed to make a tenant to the præcipe, as well as in an indenture of settlement made forty years since, the word *Birmingham* was introduced, and that there were other general words in both these instruments to warrant the insertion of *Birmingham*, as the true description of the premises in question.

1819.

ANONYMOUS.

Fiat.

BUTLER v. BROWN.

Friday,
May 21.

MR. Serjt. *Lens*, on a former day in this term, had obtained a rule *nisi*, that the prothonotary should disallow the costs of the plaintiff, and tax them for the defendant, according to the statute 43 Geo. 3. c. 46. s. 3 (a). The rule was granted on an affidavit which stated that the plaintiff had arrested the defendant for the sum of £15 : 15s., being half a year's rent for the use and occupation of a house. That the defendant had repaired the house, and the plaintiff had agreed to allow him the disbursements which reduced the debt due for rent to £2 : 17s. : 6d., which the defendant paid into Court, and which sum the plaintiff took out and proceeded no further in the action. The prothonotary, in taxing the plaintiff's costs, had allowed him the costs of the arrest: the learned Serjeant therefore contended on the authority of *Laidlaw v. Cockburn* (b), that these costs should be disallowed.

A defendant cannot apply for costs, under the 43 Geo. 3. c. 46. s. 3. if he pays a smaller sum into Court than that for which he was arrested, and the plaintiff takes it out and proceeds no further in the action.

(a) See this section, *ante*, Vol. i. 93.—(b) 2 N. R. 76.

1819.

 BUTLER
 v.
 BROWN.

Mr. Serjt. *Vaughan* now shewed cause, and relied on the case of *Rouvery v. Alefson* (a), as overruling the decision of two of the late judges of this Court, in that of *Laidlaw v. Cockburn*.

Lord Chief Justice DALLAS.—It has been decided in several cases, subsequent to that of *Laidlaw v. Cockburn*, that the statute 43 Geo. 3. c. 46. does not apply to a case of this description.

Mr. Justice PARK.—The decision of the Court of *King's Bench*, in the cause of *Rouvery v. Alefson*, has been since twice recognized in this Court: First in *Ehn v. Molineux*, in *Trinity* term, 56 Geo. 3, which is not reported, and, secondly, on an application by my brother *Best*, in the latter part of the case of *Talbot v. Hodson* (b), which is similar in terms to the present application. The term in the statute, "if the plaintiff *recover* less than the sum sworn to," must mean a recovery by the verdict of the jury, and not where a plaintiff takes money out of Court, which has been paid in by the defendant. This was decided in *Rouvery v. Alefson*. In that case it appeared that the Court of *King's Bench* had refused an application similar to the present. The cases of *Clarke v. Fisher* (c), and *Linthwaite v. Billings* are also in point (d), in the former of which Lord *Ellenborough* was of opinion that the word *recover*, in the statute, must mean a recovery by law, particularly as the statute mentioned taking out execution also; and Mr. Justice *Lawrence* remarked, that the rule for payment of money into Court was obtained by the defendant on payment of costs, and that he could

(a) 13 E. R. 90.—(b) 2 Marsh. 530. S. C. 7 Taunt. 254.—(c) *Hullock on Costs*, last edit. 136. S. C. 1 Smith's Rep. 428.—(d) 2 *Ibid.* 667.

not afterwards retreat, and say that he would not pay costs, for the former rule he had obtained was decisive against him.

Per Curiam.

Rule discharged.

1819.
BUTLER
v.
BROWN.

HANNAFORD, and Wife, plaintiffs; PEARSE, deforciant.

Friday,
May 21.

MR. Serjt. *Lens* moved that the concord of this fine might be amended. The form of the warranty was, "And moreover, the said *John* and *Elizabeth* his wife, have granted for them and the heirs of the said *John*, that they will warrant to the said *Samuel*, and his heirs, the tenements aforesaid, with the appurtenances, against them, the said *John* and *Elizabeth*, and the heirs of the said *Elizabeth* for ever." He submitted that the husband and wife should warrant for themselves, and the heirs of the wife against themselves and the heirs of the wife, and cited *Rolls Abridgment* (a), where it is laid down that if husband and wife levy a fine of land they are seized of, in right of the wife, they shall not receive a warranty for themselves and the heirs of the husband, but shall be warranted by them and the heirs of the wife.

A warranty of a fine may be amended by altering it from a warranty by the husband and wife, and heirs of the husband, against themselves and the heirs of the wife, to a warranty by the husband and wife, and the heirs of the wife, against themselves, and the heirs of the wife.

Fiat.

(a) Fine, O. pl. 3.

Friday,
May 21.

WELCH v. UPPILL, Clerk.

The right of a parson to the tithes of calves and lambs accrues when they are dropped; but they are not titheable until they have arrived at a proper age to be weaned.

THIS was an action on the case for not taking away five calves and one lamb, set out by the plaintiff for the defendant as tithes. At the trial of the cause before Mr. Justice Best, at the last Assizes at Taunton, it was admitted that the plaintiff was the occupier of a farm at *Lamyatt*, in the county of *Somerset*, and that the defendant was rector of that parish, and entitled to take the tithes in kind. That the plaintiff had compounded with the defendant for all his tithes, and that the composition was determined by notice at *Lady-day*, 1816. It was further admitted by the plaintiff, that twenty calves fell before and were weaned after *Lady-day*, 1816, and that 134 lambs were yeaned previous to that day, and weaned afterwards, and that he had set out the calves and lamb in question, which were dropped subsequently to the termination of the composition. For the defendant, it was insisted that he was entitled to the tithes of those calves and lambs, which fell previously to *Lady-day*, 1816, and became weanable afterwards, and that they ought to have been included in the tithe account rendered by the plaintiff after the composition ended. The learned Judge was of opinion that the tithes of calves and lambs were due at the time they were dropped, and not when they became weanable, and consequently that those dropped before *Lady-day*, 1816, were covered by the composition. The Jury accordingly found a verdict the plaintiff, damages £5; but leave was given the defendant to move to enter a nonsuit, in case the Court should be of opinion that the action was not maintainable.

Mr. Serjt. *Pell*, on a former day in this term, had accordingly obtained a rule *nisi* that this verdict might be set aside and a nonsuit entered, and cited the cases of *Croft v. Blake* (a), *Trott v. Rudd* (b), *Heaton v. Regal* (c), *Bedford v. Sambell* (d), and *Reignolds v. Vincent* (e), as being applicable to this point.

1819.
WELCH
v.
UPFILL.

Mr. Serjt. *Lens* now shewed cause, and observed, that there was a distinction to be drawn between the time when calves and lambs became titheable, and when the right to take them accrued. It is quite clear that the right to take them is when they become weanable, and not before; and it has been held, in the case of *Croft v. Blake*, that a custom to tithe lambs on *St. Mark's day*, being the 25th of *April*, was unreasonable and void; but in this case the question does not depend at what period they may be removed, but when the right of the rector attaches. There is no express authority as to this point, although there have been several decisions as to when they are removable. The case which bears the nearest resemblance to the present is that of *Boys v. Ellis* (f), where a question arose whether the tithing of lambs was fraudulent; and, in a note by the reporter in that case, he said, "there was no demand of tithe *pro rata*; and he doubted whether, if there had, it could have been decreed; for the tithe of lambs must be paid where they fall, and is not a divisible thing, as wool is." The taking tithe of lambs, therefore, does not depend on when they are dropped, but when they are capable of maintaining themselves, and living without the ewe. The tithe of calves and lambs may be assimilated to that of corn, for in the one,

(a) 2 *Gwillim*, 530. S. C. 2 *Gwill.* 630. — (b) 4 *Wood's Tithe Cases*, 11. — (c) 2 *Gwill.* 630. S. C. 3 *Burn's Ecclesiastical Law*, 7th edit. 499. — (d) 3 *Gwill.* 1058. — (e) *Bunbury*, 133. — (f) 2 *Gwill.* 647. S. C. *Bunbury*, 139.

1819.
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 WELCH  
 v.  
 UPPILL.

the right of the rector accrues from the severance, and it is not titheable until bound, and in the other the right attaches at the moment they are dropped, but they do not become subject to tithe, until they may be removed from their dams with safety, or when the occupier weans his own.

Mr. Serjt. *Pall*, and Mr. Serjt. *Copley*, in support of the rule, observed that, although this was a very material question, no case had been decided either in concurrence with or against the doctrine contended for, viz. to determine whether the right of the rector to take tithe of calves and lambs accrues when the animals were dropped or when they became weanable; that no inference could be drawn on this point from the case of *Boys v. Ellis*, as it was determined solely on a question of fraud. The case of *Newman v. Morgan* (a) does not lay down so extensive a principle as that the right to tithe attaches when the corn is severed from the ground; for the question there was as to when grass was titheable, and whether the farmer was compellable to scatter it after it was cut, in the course of the process of making it into hay, or whether it could be claimed from the swarth in grass-cocks, immediately on its severance: and it was there determined that it was necessary to ted it before it was titheable: it seems, therefore, that the right to take hay does not take place instantly on its being severed, but after it has undergone a certain process. So, by the case of *Croft v. Blake* lambs cannot be titheable till a certain time; and *St. Mark's day*, which falls on the 25th of *April*, has been held too early a period for this purpose. [Mr. Justice *Park*.—In that case it was said that a cus-

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(a) 1 *Camp.* 305. S. C. 10 *East*, 5.

tom to set forth tithe lambs on that day was void, which therefore shews that they were titheable before.] They can only be titheable when they can sustain themselves without their dams, and not before. In *Kenyon v. West* (a), which was a question as to the tithe of a single calf, the Court were of opinion that it was titheable, and that a tenth part of the value thereof, when taken from the cow to be sold or killed, ought to be paid in lieu of tithe. In the case of *Bedford v. Sambell* (b), Chief Baron *Eyre* says, "As to tithing lambs on *St. Mark's day*, I do not think the usage only is necessary to establish a custom, but the reasonableness is likewise material. If it is impracticable, that ought to decide against the usage. If the lambs are of no value, or not of a proper value on *St. Mark's day*, the custom is unreasonable. In *Comyn's Digest* (c) it is laid down, that, by a canon made in the year 1305, *incerti temporis, agni, vituli, pulli, equini, et alii factus decimales, decimentur habitatione ad loca ubi nutriuntur et oriuntur*. The tithes of calves and lambs, therefore, cannot be claimed when they are dropped, but after they are fed and nourished. If the proposition contended for by the plaintiff be right, the lambs may be taken by the rector the instant they are dropped, and *e converso* the owner may insist on his taking them immediately. The language, throughout the whole of the cases which have been determined on this subject, is clear and explicit; for, if the tithe were taken when the animals were dropped, it would not only be highly injurious to the mother, but the young themselves would prove of no benefit to either of the parties; the right to take them, therefore, can only accrue when they become weanable. In the case of *Lister v. Foy* (d), a custom

1819.  
  
 WELCH  
 v.  
 UPPILL.

(a) 2 *Gwill.* 541.—(b) 3 *Gwill.* 1058.—(c) *Dimes. H.* 6.—(d) 2 *Gwill.* 579.

1819.  
  
 WELCH  
 v.  
 UPPILL.

that such lambs as were able to subsist without the ewes on *St. Mark's day* should be tithed; and that such lambs as were not able to subsist without the ewes on that day, should be tithed when they were, was good: unless, therefore, they were fit to be weaned, the custom would have been bad. On all the authorities, therefore (*a*), the time of tithing lambs is when they are fit to live without their dams, and can thrive on such food as the dam lives on, and when the occupier weans his own lambs, and not before. The right to tithe, therefore, does not originate before they are weanable, and the defendant is entitled to recover.

Lord Chief Justice DALLAS.—I am clearly of opinion that the rector's right to the tithe of calves and lambs accrues when they are dropped, and that they are not titheable until they can be weaned, and are capable of living without their dams. It has been said that there has been no express authority to shew when the rector's title accrues; but the principle laid down in all the cases goes to shew that the right to tithe accrues where the animals fall. This principle may be applied generally to every description of tithes; for instance, the tithe of corn vests in the rector when severed from the land, but it is not titheable until it has undergone a subsequent process: there is, therefore, a distinction to be drawn between the article when severed, and the individual article when taken. Every produce of the land vests in the rector a right to tithe on its severance; but it is not titheable until it is set out. So, in the case of *Newman v. Morgan* (*b*), which was a question when grass was titheable, it was held, at the common law, it could not be con-

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(*a*) See *Toller on Tithes*, 2nd edit. 141.—(*b*) 10 *East*, 5.

1819.  
 WELCH  
 v.  
 UPPILL.

sidered so until it had been tedded, in the course of the process of making it into hay; and Lord *Ellenborough*, in delivering his judgment there, said, "the rule is for the rector to take his tenth part in that first convenient stage of the process, when the subject matter may be equally divided:" and he there distinguishes between the grass when it is cut down and when it becomes titheable: indeed, all the cases on the subject of tithes point to the same distinction, namely, when they become due, and when they are payable. The case of *Boys v. Ellis* (a) is precisely in point, and not to be distinguished from the present: and it was there said that the tithe of lambs must be paid where they fall, not being divisible as wool is. I therefore think that the verdict found for the plaintiff was perfectly right.

Mr. Justice PARK.—When this case was first mentioned, I entertained no doubt; but, in consequence of my Brother *Pell's* having stated that the question was not only new, but of considerable importance, I most carefully examined all the cases; and, in the result, my former opinion has been most clearly authorised and supported; and I therefore perfectly concur with my Lord Chief Justice. The general principle of tithing is, that the tenant or occupier of land shall act for the parson's benefit as he would for his own; and it was so stated by Mr. Justice *Le Blanc*, in the case of *Newman v. Morgan* (b). The word titheable is very properly used to shew the period when the tenant has done that which may be equally beneficial for the parson as himself. Other cases are, by analogy, applicable to the present: for instance, corn becomes titheable after it has been

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(a) 2 *Gwill.* 647, S. C. *Bunbury*, 139.—(b) 10 *East*, 12.

1819.  
 WELCH  
 v.  
 UPFILL.

properly divided and set out, and grass after it has been cut and undergone the subsequent process of making into hay; and this distinction runs through all the cases. Although *Boys v. Ellis* might be distinguishable from the present, on the ground of fraud, still it was there said, that the tithe of lambs must be paid where they fall. As to the custom of tithing on *St. Mark's day*, the Court, in the case of *Bedford v. Sambell (a)*, although it appeared unreasonable, still held that it ought to go to a Jury; and Chief Baron *Eyre* there drew the distinction, and stated, that "if the lambs were of no value, or not of proper value, on that day, the custom would be unreasonable;" and he also said, "it was proved that lambs fall from *Christmas* to near *Midsummer*, and could not live before ten weeks old:" it would, therefore, be a monstrous proposition, that all the tithes of those lambs should be taken on one day. In the case of *Wyburd v. Tuck (b)*, three objections were raised, the last of which might be assimilated to the present, namely, that the title to tithe arose immediately on the severance of the titheable matter from the land: and Lord Chief Justice *Eyre* there said, "is it not clear that, if a rector dies after the severance of the tithe, and before its separation, and a new rector comes in, that the right to the tithe is in the old rector? The law gives to the new rector, in that case, all that the grant gave to the new lessee in this." And with that doctrine Mr. Justice *Buller*, Mr. Justice *Heath*, and Mr. Justice *Rooke*, entirely concurred. In the case of *Trott v. Rudd (c)*, it was found that the plaintiff's lease did not commence till *Lady-day*, 1773: he had paid the tithe of those lambs which were yeaned before that day to the former lessee, and the bill

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(a) 3 *Gwill.* 1058.——(b) 1 *Bos. & Pul.* 458.——  
 (c) 4 *Wood's Tithe Cases*, 11.

was dismissed. That case is particularly applicable to the present; and, for the reasons above stated, I think the plaintiff is entitled to retain his verdict.

1819.  
WELCH  
v.  
UPPILL.

Mr. Justice BURROUGH.—It has been admitted, in every case which has been decided as to customs, when things become titheable, that the right to tithe accrues at a prior period; and it appears to be quite clear, that the tithes of calves and lambs are due at the time of their being dropped, but that they are not to be taken away until weanable: it was so held in the case of *Boys v. Ellis* (a). If the tithes became due where they were weanable, no fraud could have arisen in that case. The question here may very properly be assimilated to those which have been decided as to the right of taking tithes for corn: the right accrues immediately on its being cut; but it cannot be taken away until it has been duly apportioned and set out. It would be extremely unreasonable to say that lambs are to be tithed before they are fit to live without their ewes. In all cases relative to the produce of land the right accrues at the severance; but the produce itself is not to be taken until it has undergone a subsequent process. In *Burn's Ecclesiastical Law* (b), it is stated that "it is now clearly held that the tithe, both of wool and lamb, shall be paid where the sheep or lambs are shorn." I therefore think the plaintiff is entitled to recover.

Mr. Justice RICHARDSON.—I am entirely of the same opinion, and perfectly agree with the Court in saying that this verdict was right. In all cases of predial tithes some operation remains to be done after the severance

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(a) 2 *Gwill.* 647. S. C. *Bunbury*, 139.——(b) Vol. iii. p. 503. 7th edit.

1812.  
WELCH  
v.  
UPPILL.

from the land. Corn is titheable of common right in the sheaf, grass in cocks, and hops after they are gathered from the bind; and neither of these are titheable until one or other of these previous operations have been performed; and still it has never been doubted that the right to the tithe attaches immediately on the severance. All the cases that have been decided as to predial tithes are, in strictness, analogous to those relative to calves and lambs; for those animals may be considered as severed immediately on being dropped. Although no express authority has been found as to this particular point, and as the *dictum* cited by my brother *Burrough* from *Burn* cannot be considered as such, still I think the principle he has laid down is correct; but I am principally induced to come to this conclusion, by considering that those animals bear a strict analogy to predial tithes, and that the right attaches on the severance of the one and the dropping of the other, although they do not become titheable until they have undergone a future operation.

Rule discharged.

## (IN THE EXCHEQUER CHAMBER.)

DON on the demise of the Earl of JERSEY, and others, v.  
SMITH, (in error.) (a)

Saturday,  
May 22.

THIS was a writ of error brought to reverse a judgment of the Court of *King's Bench*, given in an action of ejectment, in *Michaelmas* term, 1816, which was brought to obtain possession of certain lands in the parish of *Llansamlet*, in the county of *Glamorgan*.

*A.*, previous to her marriage, by an indenture, executed pursuant to a power of reversion and appointment of new uses contained in her father's will, settled lands to the use of her intended husband for life, remainder to the

(a) The Reporter has been honored with copies of the opinions of the learned Judges in the following case, as well as the judgments in those in the *Common Pleas* during the last term, when that Court took time to consider; each, from the highest authorities.

use of herself for life, remainder to the use of the issue of the marriage, or of herself by any subsequent marriage, remainder, in default of issue, to such uses as she should appoint, with the ultimate remainder to herself in fee; this deed contained a power for the husband and his intended wife, during their joint lives, to demise such parts of the premises as were then leased for lives, or years determinable on lives, to any person, in possession or reversion, for three lives, or years determinable on such lives, so as there were reserved the ancient and accustomed yearly rents, duties, and services, or more, or as great or beneficial, or a just proportion of such rents, &c. according to the value of the premises to be demised (except heriots, which might be varied at will) and so as there were contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved. There was a further power for them to demise any of the premises for any term of years absolute, not exceeding twenty-one years in possession, and not in reversion, so as there were reserved as great and beneficial rents and services as were then paid, or the best and most improved yearly rent that could be obtained for the same, without taking any fine or foregift, so as in every such lease



1819.  
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 Doe
 d. JERSEY
 v.
 SMITH.

At the trial of the cause before Mr. Baron Wood, at the summer assizes at *Hereford*, in 1815, the Jury found a special verdict, which stated, in substance, that Lord Mansel, deceased, was, in his life-time, seised in fee of considerable lands and tenements, in the counties of

there were contained a clause of re-entry, in case the rents reserved were unpaid by the space of twenty-eight days. There was a third power for them to demise any of the premises wherein any mines were open, or to be opened, for any term not exceeding thirty-one years in possession, and not in reversion, so as upon every such lease there should be reserved a certain share of the produce, &c. and so as there were inserted therein the usual covenants for insuring the mines and smelting the ore, as were usually inserted in leases of that nature. At the date of the deed of settlement, a tenement, for the recovery of which this action was brought, had been, and was, subject to a lease for a term of years determinable on the lives of three persons, who died before the day of the demise laid in the declaration. By indenture after the marriage, the husband, in consideration of the surrender of the former lease, and of £105, and of the yearly rents, &c. thereafter specified and reserved on the part of the lessees, demised the aforesaid tenement to them for ninety-nine years, if three persons, or any of them should so long live, paying the yearly rent of £2 at Michaelmas and Lady-day, with a couple of fat capons, or 12.6d. in lieu thereof; and also an heriot of the best beast, or 40s. in lieu thereof, upon the death of every tenant dying in possession, and the like heriot upon every assignment, sale, &c. and also that the lessees should grind and pay toll for their corn at the lessor's mill. The lease contained a covenant by the lessees, to pay the annual rent of £2, and the other reservations, in manner above limited, "provided always, that if it should happen during the demise, that the rent of £2, and every or any of the duties, services, reservations, and payments, thereby reserved, or any part thereof, should be behind, unpaid, or undone, by the space of fifteen days next, over or after any of the days or times whereon the same ought to be paid, done, or performed, and no sufficient distress or distresses, could or might be had or taken on the premises, whereby the same might be fully raised, levied, and paid; or if the lessees should not repair the premises six months after view and notice to repair, or should commit any waste, or grind their corn at any other mill than the lessor's, or assign without license; or if any default should be made by the lessees, in the payment or performance of all or any of the reservations, covenants, and agreements, therein before, on their parts, contained, it might be lawful for the lessor, and the person to whom the freehold of the premises should belong, to re-enter. At the trial it was proved, that the rents, &c. reserved by the last mentioned indenture were, at the time of making thereof, the ancient and accustomed, and as great and beneficial rents, duties, and services as those which had been reserved at the making the deed of settle-

Brecon and *Glamorgan* comprising (among others) the tenement in question, called *Tal y Coba Uchaf*, and that the said Lord *Mansel*, being so seised, on the 11th of *December*, 1749, made his will, duly executed to pass real estates, by which he devised the aforesaid tenements to his daughter, *Louisa Barbara Mansel*, for life, with divers remainders over, and that the will contained a power enabling her, in consideration of marriage, and either before or after her marriage, to revoke all the uses and devises of the lands wherein an estate for life was by his will limited to her, and to appoint, settle, limit, and assure the same, and the fee-simple thereof to such uses, and with such powers and provisos, and in such manner, as was by her afterwards done by a deed of settlement, dated the 2d of *July*, 1757: that Lord *Mansel*, on the 29th of *November*, 1750, died seised of the said lands and tenements, without altering his will, and without heirs male, and leaving the said *Louisa Barbara* his only child and heir at law, who thereupon became seised in fee for the term of her life of the said lands. That the said *Louisa Barbara*, on the 20th of *July*, 1757, intermarried with *George Venables Vernon*, the younger, afterwards Lord *Vernon*, having before such marriage by a deed dated 2d *July*, 1757, and executed in conformity to the power for that purpose contained in the will of Lord *Mansel*, in consideration of her said marriage, revoked, annulled, and made void all the uses and devises in the said will contained concerning the said lands and

1819.

 DON
 d. JERSEY
 v.
 SMITH.

ment; and that the usual and accustomed form of leases of the tenement in question contained in the settlement for lives, or years determinable on lives as well prior as subsequent to that settlement, was with a conditional proviso of re-entry, similar to that in the present indenture.

Held: that the clause of re-entry in the lease was not conformable to the leasing power. And it seems that the former leases were not admissible in evidence for the construction thereof.

1819.
DOR
d. JERSEY
v.
SMITH.

tenements, wherein an estate for life was by the will and testament limited to the said *Louisa Barbara*; and that she, in pursuance and due execution of the power so vested in her, and by force and virtue of all other powers, &c. did appoint, settle, and limit, the last mentioned lands and tenements, with the appurtenances, and the reversion, remainder, yearly, and other rents, &c. to the Earl of *Guilford* and *Charles Montagu* and their heirs, to hold, to the use (after the solemnization of the marriage) of the said *George Venables Vernon*, the younger, and his assigns during the term of his life, *sans waste*, and after his decease to the use of *Louisa Barbara* and her assigns for the term of her life, *sans waste*, and after the determination of those estates, or either of them, by forfeiture or otherwise, in the lifetime of *George Venables Vernon*, the younger, and *Louisa Barbara*, or the survivor of them, to the use of the same trustees, and their heirs, during the lives of the said *George Venables*, and *Louisa Barbara*, and the survivor, in trust to preserve the contingent estates and uses, and for that purpose to make entries, &c. as occasion should require, permitting the said *George Venables Vernon*, the younger, and his assigns, during his life, and afterwards the said *Louisa Barbara* and her assigns during her life, to take the rents and profits, and after the decease of the survivor of them the said *George Venables* and *Louisa Barbara*, to divers other uses for the benefit of the issue of that marriage, and also of the issue of the said *Louisa Barbara*, and in default of such issue, to the use of such person or persons, and for such estates and interests, and to and for such ends, intents, and purposes, and subject to such powers, provisos, conditions, and limitations over, and in such manner or form, either absolutely or conditionally, and with or without power of revocation, as the said

Louisa Barbara, whether sole or covert, and notwithstanding her coverture, should by her last will and testament in writing, or any writing purporting or in the nature of her last will and testament, or any codicil or codicils thereto, to be signed, published, and declared, in the presence of three or more credible witnesses, direct, limit, or appoint; and in default of such direction, limitation, or appointment, or in case any such should be, when and so soon as the estates and interests thereby limited should respectively end and determine, and as to such parts of the premises whereof no appointment should be made, and in the mean time, and until such appointment should be made, and subject thereto, to the use of the said *Louisa Barbara*, her heirs and assigns for ever. That by the same deed it was provided, declared, and agreed between the said parties, in the words following; viz.—“That it shall and may be lawful to and for the said *George Venables* and *Louisa Barbara*, his intended wife, from time to time during their respective lives, when, and as they shall respectively be in possession of, or entitled to the perception of the rents and profits of the manors, messuages, lands, hereditaments, and premises so limited to them for their respective lives as aforesaid, by indenture or indentures under their respective hands and seals, attested by two or more credible witnesses, to demise, lease, or grant such part or parts of the said manors, messuages, lands, tenements, and hereditaments, or parts or shares of manors, messuages, lands, tenements, hereditaments, and premises, whereof they shall be so respectively in possession or entitled to the perception of the rents and profits as aforesaid, as now are leased for life or lives, or for years determinable on the dropping of a life or lives, to any person or persons in possession or reversion, for one, two, or three lives, or for any number of years de-

1819.

 DOE
 d. JERSEY
 v.
 SMITH.

*Leasing power as to
 estates for lives.*

1819.
 DOR
 d. JERSEY
 v.
 SMITH.

terminable on the dropping of one, two, or three lives; so as there be not on any part or parcel of the same premises to be demised, leased, or granted respectively, for a life or lives, or for years determinable on the dropping of a life or lives as before mentioned, any greater estate or interest subsisting at any one time, than what will wear out or be determinable on the dropping of three lives; and so, as on every such respective lease, demise, or grant, for a life or lives, or for years determinable on the dropping of a life or lives, there be reserved and made payable during the continuance of the estates and interest thereby to be demised, leased, or granted respectively, the ancient and accustomed yearly rents, duties and services, or more, or as great or beneficial rents, duties and services, or more, as now are, or, at the time of demising or granting the premises so to be demised, leased, or granted respectively, were reserved or made payable for or in respect of the same premises respectively, or a just proportion of such ancient or the present reserved rents, duties, and services, or more, according to the value of the premises so to be demised, leased, or granted respectively) except heriots, which shall or may be varied, altered, or compounded for, according to the will and pleasure of the said *George Venables and Louisa Barbara*), all such rents, duties, and services respectively to be incident to and go along with the reversion and remainder of the same premises, expectant on the determination of the said respective demises, leases, and grants thereof; and so as there be contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved; and so as the respective lessees, to whom such lease or leases shall be made as aforesaid, be not by any express clause to be contained in any such leases respectively, freed from impeachment

1819.
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 DOB  
 J. JERSEY  
 v.  
 SMITH.

*Leasing power as if  
 estates for years.*

of waste, and so as the said respective lessee or lessees, to whom any such lease or leases shall be made respectively as aforesaid, doth and do seal and deliver a counterpart or counterparts of such lease or leases respectively:—and also by indenture or indentures, under their respective hands and seals, attested as aforesaid, to demise, lease, or grant all or any of the said manors, messuages, lands, tenements, hereditaments, and premises, and any parts and shares of the same, or any of them, so limited to them, the said *George Venables* and *Louisa Barbara*, for their respective lives, for any term or number of years absolute, not exceeding twenty-one years, to take effect in possession, and not in reversion, or by way of future interest; so as upon every such lease for an absolute term not exceeding twenty-one years, there be reserved and made payable during the continuance of such lease or leases, so much, or as great and beneficial yearly and other rent and rents, and other services proportionably, as now is and are therefore paid and yielded, or the best and most improved yearly rent and rents that can be reasonably had or obtained for the same, without taking any fine, premium, or foregift, or any thing in the nature or in lieu thereof, to be incident to and go along with the reversion and remainder of the same premises expectant on the determination of the said respective leases; and so as the respective lessees to whom such lease or leases shall be made, be not, by any express clause to be contained in any of such leases respectively, freed from impeachment of waste; and so as the respective lessee and lessees, to whom any lease or leases shall be made respectively as aforesaid, doth and do seal and deliver a counterpart or counterparts of such lease or leases respectively, and so as in every such lease for any term of years absolute, respectively, there be contained

1819.  
 DON  
 d. JERSEY  
 v.  
 SMITH.

*Leasing power as to  
 mines.*

a clause of re-entry in case the rent or rents thereupon to be reserved, be behind or unpaid by the space of twenty-eight days after the time thereby respectively appointed for payment thereof.—And, also, by indenture or indentures under their respective hands and seals, attested as aforesaid, to demise, lease, and grant all or any part of the lands, hereditaments, and premises so limited to them the said *George Venables* and *Louisa Barbara*, for their respective lives as aforesaid, wherein or whereupon any mine or mines now is or are open, or wherein or whereon any person or persons shall be willing to open any mine or mines, sough or soughs, or other thing or things whatsoever, which may be requisite and necessary for the digging and getting of lead or copper ore, or any metal or mineral whatsoever, unto any person or persons for any term or number of years not exceeding thirty-one years, to take effect in possession, and not in reversion, or by way of future interest; and so as upon every such lease for an absolute term not exceeding thirty-one years, there be reserved and made payable during the continuance of such lease or leases, such part or share of the lead, copper, ore, coal, and other produce to be gotten from the said mines, or such yearly rent or income in respect thereof, as can reasonably be had or obtained for the same, without taking any fine, premium, or foregift, or any thing in the nature or in lieu thereof, to be incident to, and go along with the reversion and remainder of the same premises, expectant on the determination of the said respective leases; and so as the respective lessees to whom such lease or leases shall be made, be not by any express clause to be contained in any of such leases respectively, freed from impeachment of waste, other than in the necessary and reasonable winning or working thereof, and so as the said respective lessee and lessees to

whom any lease or leases shall be made respectively as aforesaid, doth and do seal and deliver a counterpart or counterparts of such lease or leases respectively, and so as there be also inserted such proper and usual covenants for the effectually winning and working the said mines, and smelting the ore, and doing all other proper and necessary acts, as are usually inserted in leases of the like nature."—That by force of the last-mentioned deed, the said *George Venables*, after the marriage, became seized for life of the last-mentioned lands, and entitled to the receipt of rents, &c.; that at the date of that settlement, and until the surrender made at the time of making the indenture next mentioned, and therein referred to, the lands in the declaration mentioned had been and were leased, and were under and subject to a lease to certain persons for a term of years determinable on the lives of three persons, who died before the day of the demise laid in the declaration.—That after the date of the settlement, and marriage, on the 5th of September, 1803, the said *George Venables Vernon* the younger, being so seized, executed, by his then name and title of *Lord Vernon*, an indenture of that date, between himself of the one part, and *Charles Smith* (since deceased) and *Henry Smith* (the defendant in error), of the other part, by which it was witnessed, that in consideration of the surrender of the former lease, and in consideration of £105, paid to *Lord Vernon* by *Charles* and *Henry Smith*, and of the yearly rents, duties, payments, services, articles, covenants, provisoes and agreements thereafter specified and reserved, and by and on the part of the lessees their executors, &c. to be paid, done, performed, and kept, *Lord Vernon* demised and granted to *Charles* and *Henry Smith* the messuage, tenement, and lands, with the appurtenances, known

1819.  
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 DOX
 d. JERSEY
 v.
 SMITH.

1819.
 Doe
 d. JERSEY
 v.
 SMITH.

by the name of *Tal y Caba Uchaf*, from the day of the date, for ninety-nine years, if the lessees and *John Smith*, the son of *Charles Smith*, or either of them, should so long live, paying the yearly rent of £2, by equal portions, at *Michaelmas* and *Lady-day*, with a couple of fat capons, on the first of *January* during the term, or 1s. 6d. in lieu thereof, at the election of the lessor, or such person to whom the inheritance of the freehold should then belong; and, also, an heriot of the best beast, or 40s. at the like choice, &c. in lieu thereof, upon the death of every tenant dying in possession, and the like heriot upon every assignment, sale, forfeiture, or alienation; and, also, the lessees yielding and doing constant suit of mill, during the term, for all their corn and grain, which should be gotten and spent upon the demised premises, unto and at such of the mill or mills of Lord *Vernon*, his heirs and assigns, or such person or persons to whom the freehold or inheritance of the premises should belong, as he and they, during the term, should for that purpose direct and appoint, paying such toll and multure as others grinding their corn there should pay. —That the lease contained a covenant on the part of the lessees to pay to Lord *Vernon*, his heirs and assigns, or to such other person or persons who should be entitled to the freehold and inheritance of the same premises, expectant in reversion, upon the determination of the same lease, a proportion of the rents reserved, in case the term should determine between any of the days of payment by the death of the persons named in the same lease, and also covenants and provisoes in the following words: “ And the said *Charles Smith* and *Henry Smith* for themselves, their heirs, executors, administrators, and assigns, and for every of them, do covenant, promise, and agree, to and with the said *George Lord Vernon*;

Covenant by lessees.

his heirs, executors, administrators, and assigns, and to and with such person or persons to whom the immediate freehold or inheritance of the premises shall as aforesaid belong, and to and with every of them, in manner and form following: that is to say, that they (the said *Charles and Henry*), their executors, administrators, and assigns, some or one of them, shall and will, well and duly, during the said term, pay, do, and perform, or cause to be paid, done, and performed, unto the said *George Lord Vernon*, his heirs or assigns, or such person or persons to whom the freehold or inheritance of the premises shall as aforesaid belong, and every of them, the said yearly rent or sum of two pounds, and the said duties, heriots, suits, services, and other the reservations aforesaid, and every of them, at the times, and in the manner above limited and appointed for payment and performance of the same, or else the several sums reserved in lieu thereof: Provided always, that if it shall happen at any time during the estate hereby granted, that the said yearly rent or sum of two pounds, and every or any of the duties, services, reservations, and payments hereby reserved, or any part thereof, shall be behind, unpaid, or undone, in part or in all, by the space of fifteen days next over or after any or either of the days or times whereat or whereupon the same ought to be paid, done, or performed as aforesaid, and no sufficient distress or distresses can or may be had and taken upon the said premises, whereby the same, and all arrearages thereof, if any be, may be fully raised, levied, and paid, or if the lessees, their executors, administrators, or assigns, or under-tenants, or any of them, shall suffer and leave the said premises, or any part thereof, to continue in decay, or unrepaired, by the space of six calendar months next after such view had and notice

1819.
 }
 DOE
 d. JERSEY
 v.
 SMITH.

Proviso for re-entry

1819.
Doe
d. JERSEY
v.
SMITH.

given, or left as aforesaid, or shall do or commit, or cause or suffer to be committed or done, any wilful waste, spoil, or destruction in or upon the said premises, or any part thereof, or shall at any time during the said term, grind any part of their corn or grain at any other mill than such mill so to be appointed by the said *George Lord Vernon*, his heirs or assigns, or such person or persons to whom the freehold or inheritance of the premises shall as aforesaid belong (the same being in repair and order to grind such corn and grain), or if the lessees, their executors and administrators, or any or either of them, shall at any time during the estate hereby granted, give, grant, bargain, sell, assign, or otherwise depart with this present demise and lease, or with their or either of their estate or interest therein, without the licence and consent of the said *George Lord Vernon*, his heirs or assigns, or of the person or persons to whom the freehold or inheritance of the premises shall as aforesaid belong, in writing under his or their hands thereunto first had and obtained; or if any default shall be by them, the lessees, their executors, administrators, or assigns, made in the payment or performance of all or any of the reservations, covenants, and agreements, hereinbefore on their parts contained, that then and from thenceforth, in all, or any, or either of the said cases, it shall and may be lawful to and for the said *George Lord Vernon*, his heirs and assigns, and the person and persons to whom the freehold or inheritance of the premises shall as aforesaid belong, into and upon the said premises hereby demised, and into every part and parcel thereof wholly to re-enter, and the same to have, hold, retain, possess, and enjoy, as in his and their former and proper estate, against the lessees, their executors, administrators, or assigns; these presents, or any

thing herein contained to the contrary thereof in any wise notwithstanding."—That no other than the above recited power of re-entry for non-payment of the rent reserved by the same indenture is contained therein; of which same indenture, the lessees then executed and delivered a counterpart; and, that the several rents, duties, reservations, and payments reserved by the indenture of the *5th September, 1803*, and secured by such render, covenants, and power of re-entry therein contained, were at the time of making the last-mentioned indenture the ancient and accustomed yearly rents, duties, and services, and then were as great and beneficial rents, duties, and services, as the yearly rents, duties, and services which at the time of making the deed of the *2d July, 1757*, or at any time thereafter, previous to, or at the making of the indenture of *5th September, 1803*, were or had been reserved, or made payable, or secured, for or in respect of the lands and tenements by the same indenture mentioned to be demised.—That the lands and tenements, with the appurtenances in the declaration mentioned, were and are the same lands and tenements, and that the usual and accustomed form of leases of the estates contained in the marriage-settlement of *2d July, 1757*, for lives or years determinable on lives, as well prior as subsequent to that settlement, was with a conditional proviso of re-entry similar to that in the indenture of *5th September, 1803*; and, that all the rents, duties, and services reserved by the last-mentioned indenture, and which accrued in the lifetime of Lord *Vernon*, have been discharged and performed; and, that *Henry Smith* has been ready to pay and perform all sums, matters, and things, that would have accrued to this time, supposing the last-mentioned indenture to have continued in force and undetermined; and, that *Charles*

1819.
 DOR
 d. JERSEY
 v.
 SMITH.

1819.
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 DOE  
 d. JERSEY  
 v.  
 SMITH.

*Smith* was since deceased, but that *Henry Smith* and *John Smith* are still living; and, that after the making of the last-mentioned indenture, and before the day of the plaintiff's demise, the said *Louisa Barbara*, by virtue of the powers to her given by the deed of 2d *July*, 1757, duly made her last will and testament in writing, dated the 5th of *August*, 1783, signed, published, and declared by her, and attested and subscribed in her presence by three credible witnesses, and thereby devised the lands and tenements, devised by the will of Lord *Mansel* to her, subject to the estate for life of her husband therein, to *Thomas Earl of Clarendon* for life, remainder to *William Augustus Henry Villiers*, afterwards *William Augustus Henry Villiers Mansel*, second son of *George Bussy Villiers*, Earl of *Jersey*, and his heirs; and that on the 1st *January*, 1786, she died without issue, and without altering her will as to her devise of the last-mentioned lands and tenements with the appurtenances. That on the 1st *January*, 1787, the Earl of *Clarendon* died, whereupon *W. A. H. Villiers* became seised in fee of the remainder of the last-mentioned lands and tenements, expectant on the life of Lord *Vernon* therein. And that the said *W. A. H. Villiers*, being so seised, by indentures of lease and release, of 4th *January*, 1812, by a certain indenture of bargain and sale then made between the said *W. A. H. Villiers*, of the one part, and the said *George Earl of Jersey*, *Edward Ellice*, and *Alexander Murray*, in the declaration mentioned, of the other part, the said *W. A. H. Villiers*, by his then name of *W. A. H. Villiers Mansel*, in consideration of the sum of £s., then paid by *George Earl of Jersey*, *Edward Ellice*, and *Alexander Murray*, bargained and sold the remainder of and in the said last mentioned lands, &c. to the said Earl of *Jersey*, *Edward Ellice*, and *Alexander*

*Murray*, to hold the same to themselves, their executors, administrators, and assigns, from the day next before the date of the last mentioned indenture, for the term of one year from thence ensuing, the further remainder belonging to the said *W. A. H. V. Mansel*, his heirs and assigns; and the said Earl of *Jersey*, *E. Ellice*, and *A. Murray*, being so interested, and the further remainder belonging as aforesaid, on the 6th day of *January*, 1812, conveyed the same to *George* Earl of *Jersey*, *Edward Ellice*, and *Alexander Murray*, the lessors of the plaintiff, who thereupon became seised in remainder; and upon the decease of Lord *Vernon*, on the day of the demise alleged, became seised of the last-mentioned lands and tenements, with their appurtenances, in their demeane as of fee; and on the day laid in the declaration demised the premises to the plaintiff, and that the defendant entered and ousted him.

This case was twice argued: first in *Easter* term, 1818; by Mr. *Littledale*, for the plaintiff, and Sir *Robert Gifford*, *Solicitor-General*, for the defendant; and again in last *Hilary* term, by Mr. *Jervis*, for the plaintiff, and Mr. *Frederic Moysey*, for the defendant.

May 30, 1818.—Mr. *Littledale*\*.—It appears, by this special verdict, that the lease, under which the defendant claims, was made by a person who was tenant for life, having a power to grant leases; and the question is, whether the lease so granted is conformable to the power? It cannot be so, *first*, because it does not give a

1819.  
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 DOE
 d. JERSEY
 v.
 SMITH:


* *N. B.*—The Reporter has thought proper to deviate from the regular course, and publish the elaborate arguments of the learned counsel distinctly and separately, both from the importance of the case, and the great labour and attention that have been bestowed on it.

1819.
 Doe
 d. JERSEY
 v.
 SMITH.

power of re-entry in case the rent be not paid according to the reservation ; the power being for re-entry on non-payment of the rent thereby reserved : and, therefore, the lease does not give a power of re-entry, according to the terms of the settlement, but protracts such right by not authorising it, unless the rent be in arrear fifteen days : *Secondly*, the lease does not contain an absolute power of re-entry for non-payment of rent, but only a qualified power in case there be no sufficient distress on the premises.

The defendant contends that this lease is sufficient, First,—because the power does not require that a re-entry should be given in case of non-payment of the rent on the day on which it is reserved, nor does it require an absolute right of re-entry ; but that all that is necessary is, that there should be some power of re-entry, and that there is, in fact, such a power in this lease, and that nothing prevents its being considered a compliance with the terms of the power in the settlement of 1757. Secondly, That the power which Lady *Vernon* must be supposed to have had in contemplation, is to be collected from the leases which had been executed of premises, which formed part of the estate which is the subject of the power : Thirdly, that in fact the power has been complied with, by Lord *Vernon*'s having reserved as beneficial rents, as had been before reserved in respect of the estate ; and, Lastly, that there is, in fact, a power of re-entry given by the general clause at the end of the lease, which enables the lessor to re-enter in case of the non-payment or non-performance of the reservations, covenants, and agreements in the lease ; and that this clause gives a power of re-entry, in case of the non-payment of the rent on the day on which it becomes due, without regard to there being a sufficient distress on the

premises; that this general clause at the end supersedes the prior clause, which had been limited by the fifteen days, and clogged also with the condition, in case there should be no sufficient distress upon the premises. To this it must be objected, first, that it is not a power of re-entry given for non-payment of the rent, according to the reservation, but that it is protracted to a period of fifteen days: The power is a power of re-entry for non-payment of the rent thereby to be reserved, which means a power of re-entry in case the rent be not paid according to the reservation, that is, be not paid on the day on which it becomes due. Powers of re-entry for non-payment of rent are very clearly defined by various writers; and *Littleton* says (a), that "estates upon condition are of two sorts, either by deed or law; that mere condition by deed is, where a man by deed enfeoffs another in fee, reserving to him and his heirs yearly a certain rent, payable at one feast or divers feasts *per annum*, upon condition that if the rent be behind, &c. that it shall be lawful for the feoffor and his heirs into the same lands or tenements to enter, &c. And if it happen that the rent be behind by a week or month after any day of payment of it, or by half a year, &c. that then it shall be lawful for the feoffor and his heirs to enter, &c. In both these cases, if the rent be not paid at such time or before such time limited and specified within the condition comprised in the indenture, he may re-enter the estate and oust the feoffee." There is a clear marked distinction between a power of re-entry, where rent is payable generally, and a like power where it is postponed, if the rent be behind for a certain number of days. There is another power of re-entry for a condition broken, distinctly treated of in *Comyn's Digest*, as to where an entry

1819.

 DOE
 d. JERSEY
 v.
 SMITH.

(a) Sec. 325.

1819.
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 DOE  
 d. JERSEY  
 v.  
 SMITH.

is given till satisfied, for it is there laid down that (a), "A condition to a feoffment, &c. may give an entry generally, or a special entry, as till he be satisfied; as if a condition be that the lessor shall enter and hold the land till he be satisfied, he shall have the land only in the nature of a distress." But where the entry is general, it is said (b) that, "If a condition upon a feoffment or other estate of freehold be, that for non-performance, the feoffor, &c. shall enter; if the condition be broken, the estate is not defeated generally, till entry or claim; and therefore, if he can, he ought to make an actual entry." There are therefore two classes of estates upon condition containing clauses of re-entry; one, that the feoffor or the lessor is entitled to re-enter till he be satisfied the rents and profits, which only gives a right to receive the rents; and the other where he has a general right of re-entry.—Those are the two distinctions drawn by Chief Baron Comyn, and laid down by *Littleton* (c).—Lord Coke, in his commentary on this section, subdivides the right of re-entry into two branches; the one, where the rent is not paid on the day when it becomes due, and the other where it is postponed. This being a general clause of re-entry in the power must fall within the first branch, and therefore the right of re-entry accrues in case the rent be not paid according to the reservation, that is on the day on which it becomes due; if it could be extended to fifteen days, it might be extended to the periods mentioned by *Littleton*, and even to a year, for in *Grygg v. Moyses* (d), there was a proviso for re-entry in case the rent should be in arrear a year after the day of payment, that case therefore shews that the payment of rent may be postponed for a year: But the inconvenience would be

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(a) *Com. Dig. Tit. Condition. O. 3.*—(b) *Id. Condition. O. 5.*—(c) *Sect. 325.*—(d) *Cro. Eliz. 764.*

great if it were postponed at all, for it might happen that the lessor, or the original tenant for life, might die before the day which the feoffee or the lessee has given him to save his forfeiture, and in that case the rent could not be demanded until the last day; so that, if there be a clause of re-entry, provided the rent be unpaid fifteen days, the demand must not be made on the day on which it ought to be paid, but on the last day to save the forfeiture, and consequently no demand could be made in this case till the fifteenth day. So, if the lessor should die between the day of reservation and the day on which the rent was to be paid to save the forfeiture, it might be extremely difficult to demand the rent, because, if his will were not proved, the executors or administrators would not be entitled to it, or there might be no person to demand it, and then it would be doubtful whether the remainderman could bring an ejectment upon a demand made by the executors of the tenant for life; so that, in fact, the right of re-entry might be barred altogether. The next objection in this case is, that the power of re-entry is clogged with the condition, "if there shall be no sufficient distress on the premises." The plain meaning of the words used in the deed creating the power, appear to bear a different construction: if the lease were not clogged with this condition, there would be an immediate right of entry given to the lessor by the common law; but if it be so clogged, he has then no right of re-entry, unless he can prove that there is no sufficient distress on the premises; and therefore he cannot bring an ejectment till he has ascertained, and be enabled to prove that there was no such distress, because, unless he can shew that, he has no title to enter. So that before the statute 5 Geo. 2. had passed, he must have proved two things; first a demand of rent on the day, and secondly, that there was no sufficient distress on the premises,

1819.  
 {  
 DOE  
 d. JERSEY  
 v.  
 SMITH.

1819.  
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 DOE
 d. JERSEY
 v.
 SMITH.

but now he need not prove that he demanded the rent on the day. In *Coxe v. Day* (a), it was treated as a clear proposition, that a right of re-entry, clogged with such a condition as the present, was not so beneficial to the remainder-man as an absolute power of re-entry on non-payment of rent; and the same was adopted in *Doe d. Vaughan v. Meyler* (b), where it was taken for granted that the lease was void in consequence of there being a clause of re-entry in case of non-payment of the rent for fifteen days, if no sufficient distress; and although the lease was there held good in part, yet it was admitted that this clause would avoid the whole; and therefore the principle laid down in *Coxe v. Day* received an affirmation, and was assumed in that case to be good law. It would be extremely difficult to know whether there be or be not a sufficient distress upon the premises. Suppose a distress be made when there is nothing but standing corn on the premises, which is distrainable the moment it appears above the ground, yet the statute which gives a right to distrain corn (c) directs that it shall not be appraised till it is cut and gathered, so that if rent become due at *Michaelmas*, 1817, and a distress be made in the *December* of that year, the value of such distress cannot be known till the autumn of 1818, when the corn would have become ripe enough to be cut; the consequence of which would be that an ejectionment could not be maintained till the spring of 1819, because the distress could not be ascertained till the autumn of 1818. There is this further objection to the clogging the lease with this condition, which is, that if a distress be made, the remedy by re-entry is lost, because the distress affirms the tenancy (d). So if the landlord

(a) 13 *East*, 118.—(b) 2 *Maule and Sel.* 276.—(c) 11 *Geo.* 2. c. 19. s. 8.—(d) *Co. Litt.* 212. b.

distrain, he loses his right of entry (a); and in the cases of *Zouch d. Ward v. Willingale* (b), and *Goodright d. Charter v. Cordwint* (c), it was held that a distress amounted to an express confirmation of the tenancy; and therefore if a person distrains, he admits the tenancy, and the right of entry is gone, and consequently the adding this clause, and making it necessary that there should be no sufficient distress, takes away the power of re-entry meant to be given, because there can be no power of re-entry if there be a sufficient distress on the premises, for it takes away the chance of forfeiture and the power to re-enter. The estate would be less valuable if the lease be clogged with this power. The meaning of the creator of the power was, that the remainder-man should enjoy the estate as beneficially as was consistent with the nature of the power he had created. By the power, three sets of leases are to be made; the first a lease for lives, or determinable on lives; the second a lease for years; and the third set relates to mines—in the first, where the ancient rent was to be reserved and a fine taken, the power to re-enter is for non-payment of rent thereby to be reserved—in the second, where a rack rent is to be taken, and which is confined to leases for twenty-one years, the power of re-entry is qualified in case the rent be in arrear for twenty-eight days. In neither of these leases is there any thing said about there not being a sufficient distress on the premises; and it is more than probable that Lady *Vernon* might have felt the inconveniences that would arise to the tenant for life, or the remainder-man, if he were obliged to see the sufficiency of the distress before he distrained. She meant particu-

1819.

 DOE
 d. JERSEY
 v.
 SMITH.

(a) 1 *Rolle's Abridgment*, 475.—(b) 1 *H. B. C.* 311.—
 (c) 6 *Term Rep.* 219.

1619.
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 DOR  
 d. JERSEY  
 v.  
 SMITH.

larly to exclude it from the leases for lives, and for this reason;—that if the landlord were obliged to distrain for a pepper-corn rent, the costs of the distress would amount to more than the rent itself; for the rent is only £2 *per annum*, and supposing that all the leases upon this estate, which amount to several hundred, were leases for lives, each at £2 per year, the expenses for the several distresses would be enormous; and if the rents should all be in arrear at the same time, there would be the further expense incurred by sending persons to inquire of the sufficiency of the distress, on the premises of the respective lessees, before he would be authorised to bring an ejectment; and if it be said that the re-entry was only a security for the rent, and that the tenant might come in and redeem, yet the statute limits the time of such redemption to six months after the execution, after which the tenant is barred. Here the right of re-entry would be rendered nugatory, because there always would be a sufficient distress on the premises for so small a rent, whatever there might be on the estates at rack rent. It was admitted in the argument in this case in the court of *King's Bench*, that *Coxe v. Day* (a) need not be disturbed, and therefore it must have been conceded that the power in the second class of leases could not be clogged with the condition relative to the distress; and consequently *Lady Vernon* must be supposed to have meant that the lessor should have an absolute right of re-entry under the second, and only a qualified one under the first set of leases. For such a supposition there can be no reasonable ground; on the contrary, there is no reason to suppose the second set of leases should be more strictly watched than the first, because by the latter the remainder-man is more particularly bound; by the second,

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(a) 13 *East*, 118.

he gets nearly as full an enjoyment of the property under them, as if he had been in possession and able to make the leases himself, because it cannot be supposed that in a few years the rents will fall to any great degree; but under the first set, the interest of the remainder-man is nearly destroyed, for the tenant for life receives a fine and a nominal rent, to the latter of which only is the remainder-man entitled, and it is only in the time of the remainder-man that the question about extending the time and clogging it with a condition can be made to arise, because during the time of the tenant for life, he himself would be bound by his own lease. This power cannot be construed favourably for the tenant for life, for the general legal construction of powers made by tenants for life is, that they ought to be in favour of the remainder-man, because he is prejudiced if the lease be improperly made. There is no hardship on a tenant for years, however the lease may be clogged, because he will pay his rent accordingly; but if there be an indulgence for rent, the tenant for life may increase or diminish the fine according to the rent, being either nominal or valuable. It has been said in this case to be sufficient if there be a reasonable power of re-entry, as that is what may be supposed to have been in the contemplation of the parties, which proceeds on the assumption of *Lady Vernon* having required a power of re-entry, without saying what kind she meant to specify: but she has pointed out what quality she requires the power to have, and that is a power of re-entry for the non-payment of rent, which is not in the defendant's lease. The defendant says, that as *Lady Vernon* has expressed herself in such general terms, she was indifferent what sort of execution of the power was made, and therefore as she has mentioned but one condition, the other is to be filled up at the discretion of the tenant for life, who may engraft on it as many con-

1819.  
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 DOE  
 d. JERSEY  
 v.  
 SMITH.

1819.  
DOE  
d. JERSEY  
v.  
SMITH.

ditions as he pleases. The general terms of the power are not complied with if something else be superadded. If the clause in the lease had followed the power as directed in the deed, it would have ran thus: "provided always, that if the rent hereby reserved shall not be paid, then and in such case the lessor and his heirs may re-enter;" instead of which additional words were superadded, which it is contended may be introduced at the discretion of the tenant for life. If the lease had strictly followed the power, and no other words had been introduced, the original tenant for life might have re-entered, for non-payment of rent, on the day on which it was reserved and made payable. There is no pretence whatever to say, that under the power, the tenant for life had a right to introduce the clogs and conditions with which the lease is encumbered. If the tenant for life had given his solicitor no directions as to what conditions were to be inserted in the lease, these conditions would not have been superadded; he might as well have introduced a special power, such as a power to re-enter till the rents are satisfied, which would not give the power of re-entry for possession of his former estates, but merely till those rents which were due had been paid. The Court cannot decide whether this be or be not a *reasonable* execution of the power; of late years it has been considered as a mixture of law and fact, and this being of the same nature, they cannot determine the reason of the execution, as the kind of land in the estate must be taken into consideration, as well as other circumstances, which being matter of fact they will not attend to. How would this case stand upon the rules of pleading? If any fact were pleaded in the terms of the instrument creating the power, and the evidence to support it was the mode of its execution—would it not be a variance? Suppose the lord of a manor were to

allege a custom to enter on his copyholders for non-payment of their rents in the terms of this power, and he were to give in evidence that the usage had been to give a power of re-entry, in case the rent was unpaid, for fifteen days, and no sufficient distress be had on the premises; or if he were to aver as to freehold estates held of the manor, a tenure in the terms of this power, and produce evidence in the terms of this lease; in one case, the custom, and in the other, the tenure, would not be proved. If a prescription be alleged in general terms, and on proof it appear that it was clogged with certain conditions, that would not support the prescription. Supposing a right of entry was pleaded under an annuity deed, which was stated in pleading to be according to the terms of this power in the settlement, and the annuity deed when produced in evidence appeared to be exactly in the terms of this lease, that would not maintain the allegation. It will be contended for the defendant, that the words in the power, "as great or beneficial rents and services shall be reserved as had before been reserved," are fully answered, and that as beneficial a rent has been reserved here. Now the term beneficial applies only to the amount of the rent, and not to its security, either in money or in money's worth. There is a ground on which, perhaps, it may be asserted the defendant has a right to enter into the meaning of the word beneficial, by connecting the former leases, so as to aid such a construction: but those leases are no evidence whatever, for although the power alludes to the ancient rents, it does not extend to the ancient power of re-entry, and therefore when that power is wished to be engrafted upon this lease, the other leases are perfectly inadmissible, and ought to be considered as struck out of the special verdict altogether, for the power of re-entry is left in general terms. It does not appear what the

1819.  
 }  
 DOB  
 d. JERSEY  
 v.  
 SMITH.



1819.  
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 DOR
 d. JERSEY
 v.
 SMITH.

former power of re-entry was till the year 1750: Lord *Mansel* up to that time was owner of the fee, and he might impose any conditions he pleased on his tenants; during the tenancy for life of Lady *Vernon*, it does not appear what power she had of making leases, and it cannot be inferred that she had such a power as she created by the deed of 1757; therefore prior to that year the leases themselves can have no operation whatever; *Non constat*, but that she was prohibited from extending the clause of re-entry to fifteen days, there being no sufficient distress upon the premises; and therefore what has been done in former times has no application to the subject, because it is not shewn that the parties had the same control over the estate as at present. The inconvenience that would arise from such conduct is not the least of the bad consequences, for every tenant for life must then look to the leases for 100 years back; and should he execute the lease according to a power granted, it still might be impeached, for not being made according to the usual form of the ancient leases; besides that, the validity of a lease should be tried by the power under which it is made, and not by former and precedent leases, which existed anterior to the creation of the power. The uniform tenor of all the cases has been that former leases are not to be referred to. In *Cooke v. Booth*, indeed (a), where there had been successive renewals, containing the same form of renewal from the time of the former lease granted by the ancestors of the party in 1688, the question was upon what terms the lease should be renewed? The Judges of the Court of *King's Bench* thought former cases might be admitted to explain the meaning of the covenant; but that case has been uniformly disapproved of both in the Courts of Law and Equity, and a different rule is now

(a) *Cowp.* 819.

established. The first case in which it came to be considered was in that of *Baynham v. Guy's Hospital* (a); there Lord *Alvanley* most strongly protested against that decision. In *Eaton v. Lyon*, before Lord *Alvanley* (b), he disclaimed putting a construction as in *Cooke v. Booth*, from the acts of the parties. In *Moore v. Foley* (c), Sir *William Grant* also denied the authority of *Cooke v. Booth*; so in *Iggulden v. May* (d), Lord *Eldon* expressed his dissatisfaction of that case. And when *Iggulden v. May* came before the Court of *King's Bench*, Lord *Ellenborough* (e) said that "serious doubts had been entertained of the doctrine laid down in *Cooke v. Booth* (f), and which then it was unnecessary to decide;" and when *Iggulden v. May* was brought on error into the Court of *Exchequer Chamber* (g), Lord Chief Justice *Mansfield*, and the whole Court, were of opinion that the case of *Cooke v. Booth* could not be considered as an authority, as it had been impeached upon all occasions, and in which the Court of *King's Bench* were misled by the renewals stated in the case sent from the Court of *Chancery*. The former leases, therefore, are not admissible in evidence, as there is a strong opinion, both in Courts of Equity and Law, that the acts of former parties are not to be brought in aid to construe the particular act in discussion. The general power of re-entry does not qualify the former power. Independently of this, the lease is not conformable to the power, first, in extending the time for re-entry to fifteen days, and secondly, in clogging it with the condition, in case there should be no sufficient distress on the premises.

The *Solicitor General*, *contra*. The only question in this case is, whether the power of re-entry is con-

1819.

Doe

d. JERSEY

v.

SMITH.

(a) 3 *Ves. Jun.* 295.—(b) *Ib.* 690.—(c) 6 *Ves. Jun.* 232.—(d) 9 *Ves. Jun.* 325.—(e) 7 *East*, 245.—(f) *Cowp.* 819.—(g) 2 *New Rep.* 449.

1619.
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DOE
d. JERSEY
v.
SMITH.

formable to that of leasing in the settlement, or whether the former complies with the terms of the power. A power of leasing must be construed according to the intention of the party creating it, and is not to be construed strictly, but the whole of the instrument must be looked at in order to collect such intent. Here there are three powers of leasing given, by the first of which the tenant for life is empowered to lease to any person in possession or reversion, provided he does not grant a greater interest than for three lives; and is restricted to such lands as have been usually let for life or lives; which leases are to contain a power of re-entry for non-payment of the rent thereby to be reserved. The second power is to lease at rack rent, and differs very materially from that of leasing for lives; and these leases are to contain a clause of re-entry in case the rent be unpaid by the space of twenty-eight days after the term therein appointed for payment thereof. The third is a power to lease lands where there are mines, and which contains particular directions as to those leases. It is found, by the special verdict, that the lease in question is conformable to the ancient leases with respect to the rent to be reserved. The first power is general in its terms: a power of re-entry is all that is required. There was a discretion in the tenant to insert a reasonable power of re-entry. This is reasonable, and therefore the terms of the settlement have been complied with. It has been said that the former leases are only to be looked to with respect to the payment of rent; but the rent must be reserved in the same way as in those leases. On the construction of the whole of the power, the donor meant that those former leases should be looked at not merely to ascertain the quantum of rent, but the manner of reserving it, and the proviso of re-entry is one of the terms on which it is reserved. With respect to the leases for lives, the power only requires a right of

re-entry generally: a reasonable power of re-entry therefore is all that can be required; and yet it has been said, that in the case of a power of re-entry, when there is no sufficient distress, a party loses the right to re-enter, if he do not use the means of knowing whether there be a sufficient distress or not. There was never a lease for lives containing a power of re-entry in case the rent was not paid at the day on which it became due. As to the admissibility of the former leases in evidence, the case of *Iggleden v. May* (a) has no application to the present, as the question there was, whether the lease should contain a covenant for renewal, and the words were plain to grant a lease for twenty-one years, and a renewal under the covenant contained in that particular lease; and other leases were attempted to be produced in order to construe that covenant, but it was held that the terms of the covenant were plain, and that there should not be another. But here it cannot be contended, that under this power, a lease might be granted reserving a rent annually, which had before been reserved quarterly: The former leases must therefore be looked to as to this mode of reservation and the proviso for re-entry. The case of *Coxe v. Day* (b) does not affect the present question. The proviso there was similar to the second power here, viz. that there should be a power of re-entry, in case of non-payment of rent for twenty-one days; and the lease in that case was with a power of re-entry in case the rent was behind for twenty-one days; and there was no sufficient distress on the premises, and it was there contended, that as the power expressly pointed out that the right of re-entry was to be in case the rent was behind for twenty-one days, the clogging it with the sufficiency of distress was an excess of the power. That

1819:
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 Doe
 d. JERSEY
 v.
 SMITH.

(a) 9 *Ves. Jun.* 325. 7 *East*, 237. 2 *New Rep.* 440.—
 (b) 13 *East*, 118.

1819.
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 DOE  
 d. JERSEY  
 v.  
 SMITH.

case, however, is in direct opposition to *Hotley v. Scott* (a), which was not there adverted to, where the power was to lease for any number of years, and the lease contained a clause giving a power of re-entry if the rent was unpaid for twenty-one days. The same objection was there taken against the lease as here, and the Court determined that the clause for re-entry was for the security of the rent, and that by the statute of *Geo. 2.* there could not be a re-entry unless there had been a sufficient distress; and Lord *Mansfield* (b) is reported to have said, "Re-entry is a power given to enforce the payment of rent. The clause of re-entry is for securing the rent; it is short, with words of course, and does not preclude the operation of law; but the law says you shall demand the rent before you make use of this remedy." If the lessor of the plaintiff had granted under the second clause of the power, the case of *Coze v. Day* (c) might apply, but it does not touch the first, which only requires a reasonable power of re-entry, and not in case of the rent's not being paid on the day. With respect to the latter, or general clause of re-entry, it has words sufficient to embrace the non-payment of rent at the day, when the lessor may re-enter; and it has been said, that this clause can have no operation, as it is repugnant to the first. But in *Sheppard's Touchstone* (d) it is laid down as a general rule, that if there be two clauses of a deed repugnant to each other, that the first shall be received and the latter rejected, except there be some special reason to the contrary. There is another rule of construction applicable to this case, viz. that the whole of the deed must take effect according to the letter, *ut res magis valeat quam pereat*. This being a lease as against the remainder-man, can only take effect according to the

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(a) *Lofft*, 316. S. C. MS. note of Mr. *Butler*.—(b) *Butler's MS.*—(c) 13 *East*, 118.—(d) Page 68. section 7.

execution of the power; if it take effect on non-payment of rent, it only does so if there be a general clause of re-entry; if there were no other clause than that it should be lawful for the lessor to re-enter, the right of re-entry would accrue, if the rent were not paid at the day; but here it is qualified by the words, if it be not paid within fifteen days. In the construction of a deed the general rule must prevail, unless there be particular circumstances which shall induce the Court not to apply it. So it must be considered here, unless the latter general clause is to overrule the former. The inconsistency in this case between the general and special clauses is not greater than in *Roe d. Goatley v. Paine (a)*, where there was first a general covenant to repair, and afterwards a special covenant to repair within three months after notice, with a general power to the landlord to re-enter in case the tenant broke any of the covenants. The landlord there re-entered after notice, and before the expiration of the three months; and Lord *Ellenborough* held that he might do so, as the lease contained a general covenant to repair, which had been broken by the tenant: So here, there is a general clause in the first power, and this is the usual power of re-entry, and by the former leases it appears that this power is customary and reasonable; and therefore the lessor could not re-enter on non-payment of the rent at the day on which it became due. Whether, therefore, this be a reasonable power or re-entry, or the usual power, the lease has sufficiently complied with it, and is in conformity thereto.

Mr. *Littledale*, in reply.—The case of *Hotley v. Scott* is so inaccurately reported, that it was unnecessary to refer to it in that of *Coxe v. Day*. The former could have been but little considered, or undergone any

1819.  
DOE  
d. JERSEY  
v.  
SMITH.

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(a) 2 Camp. 520.

1819.  
DOE  
d. JERSEY  
v.  
SMITH.

serious discussion, for Lord *Mansfield* is there reported to have said (a), "As to demand, a clause for re-entry is required as a security for the rent, demand is requisite both by common law and statute." That cannot be correct, because a demand was rendered unnecessary by the statute; and his Lordship is also supposed to have said in that case, that "a clause of re-entry will never be allowed further than as a security for rent." But the authority of *Littleton*, and the propositions of *Comyn*, shew that the clauses of re-entry for non-payment of rent must operate much further than a security for rent, because they are clauses of condition, and shew that there is a distinction between a right of re-entry where there is not a sufficient distress, and a similar right where there is. It has been contended for the defendant, that the first clause as to the leases for lives contains a power to let leases in reversion, which shall and may contain certain covenants and powers; but it does not necessarily follow that those leases are to be precisely in the same form as the former leases had been. Although the leases in reversion may contain a stipulation that the rent shall be paid half-yearly, having been before paid quarterly; yet the mode of securing such rent is not to be on the same terms as those contained in the former leases. This, however, refers to the former leases, as to the amount of the rent, and that the ancient duties and services are to be kept up in the new leases; and it also refers to the former leases, as to ascertaining the class of lands to be let under the new ones. But in the power of re-entry, no reference whatever is made to the former leases, though the creator of the power has given directions as to the requisites of the new leases for three several species of property. With respect to the leases for lives, the power

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(a) *Loffi*. 319.

of re-entry is general on account of the smallness of the rent, and the donor intended to secure the remainderman in the strictest possible way. It has been also contended, that this must be a reasonable power according to the discretion of the tenant for life. But no discretion is given, except as to heriots. How comes it that twenty-eight days are to be introduced in the cases of rack-rent only, if the creator of the power did not know the import to be given to the three different classes of leases? In no part of the settlement is there the least intention manifested by the creator of the power, that the leases for lives should be clogged as this is, or that even a reasonable extension should be allowed to the tenants for life. The intention of reasonableness is wholly speculative. In the case of *Doe d. Allan v. Calvert*, (a) though the leases were according to the custom of the country, it was not a good execution of the power; and although various deeds were produced to shew such custom, the Court refused so to treat it. The construction of powers must be confined to the instrument which creates them. Not even a reasonable discretion can be had recourse to or permitted, in the leases for lives; but they must be strictly confined to a power of re-entry for non-payment of rent on the day, and cannot extend to the fifteen days, as contended for by the defendant. But at all events the words "non-payment of rent" cannot be clogged with the further terms "if there be no sufficient distress on the premises." As to whether this be the usual and accustomed power of re-entry, and a good execution of the power, the rule is to see whether it be conformable to the words of the power, and not to introduce extrinsic evidence, unless it is fairly to be col-

1819.  
 Doe  
 d. JERSEY  
 v.  
 SMITH.

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(a) 2 East, 376.

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1819.  
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 DOR
 d. JERSEY
 v.
 SMITH.

lected from the words of the instrument creating such power. Now in this case there is no ambiguity; it is a power of re-entry for the non-payment of rent. No reference can therefore be had to the former leases. As to the latter clause being a good execution of the power, it cannot be contended that where a special power of entry is given on a particular event, that it can be controlled by a general power. The case of *Roe. d. Goatley v. Payne* is wholly distinct from the present, as there a clause was merely superadded that the lessor might give his tenant notice to repair under a power of entry to view the premises. The clauses there were perfectly inconsistent, and the question was whether the breach of the general covenant should take away the other; but here is a general clause of re-entry at the end, which can extend only to the cases not before provided for, and does not contemplate the non-payment of rent. A special power cannot control a general one.—*Hill v. Grange* (a)—*Turpin v. Forreynier* (b)—so in *Cother v. Merrick* (c), when there are two clauses in a deed, of which the latter is contradictory to the former, there the former shall stand. In *Berry v. Perry* (d) it is said, in the interpretation of words there are two grounds:—1st, if the second part contradicts the first, the second shall be void; 2dly, if the last part expound the first, both shall stand. Here both parts may stand together, as in one, the special clause operates as an exposition of the other. In *Ncker's* case (e), where a question arose on a bond, the words of demise were used, and there was a covenant for the lessees quiet enjoyment without eviction, by the lessor or any

(a) *Plowden's Commentaries*, 106.—(b) 1 *Bulst.* 101.—
 (c) *Hardres*, 89.—(d) 1 *Rolle's Rep.* 376.—(e) 4 *Rep.* 80.

claiming under him; and it was held that the express covenant qualified the generality of the covenant in law, and restrained it by the mutual consent of both parties that it should not extend farther than the express covenant, *quia clausula generalis non refertur ad expressa*. There are a great number of other cases on this point, which are collected in *Viner's Abridgment* (a). That of the Archbishop of *York v. Vernon* is expressly applicable to this part of the case. If *Coxe v. Day* (b) be an authority, and this case were decided for the defendant, it would be difficult, if not impossible, to reconcile them. The only question here is, whether this lease be executed according to the intention of the creator of the power. There is no ambiguity in the original deed of settlement, and the former leases were, therefore, inadmissible in evidence; but even then, the intention of the creator of the power is clear and manifest.

1819.
 Dox
 d. JERSEY
 v.
 SMITH.

Jan. 29, 1819.—Mr. *Jervis*, for the plaintiff.—By the original settlement of 1757, the respective tenants for life were empowered to grant various sorts of leases of different kinds of property; and among others, leases for lives or years, determinable on lives, of lands formerly let in that manner, under certain conditions and restrictions; and amongst others; “So as there were contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved.”—The lease in question contains a power of re-entry, in case of non-payment of rent for fifteen days, and there being no sufficient distress on the premises. This, therefore, is not a valid lease, under the leasing power, as against the remainder-man. In order to support this position, it is necessary to consider, *First*, the grammatical construction of the particular part of the

(a) *Tit. Grant. H.* 13.—(b) *18 East*, 118.

1819.
Doe
d. JERSEY
v.
SMITH.

power on which the present question arises: *Secondly*, the intention of the creator of the power, to be collected from the words, and the object of the whole of the power, considered both collectively, and in its separate parts: *Thirdly*, the rule by which the power is to be construed: *Fourthly*, that the proviso for re-entry in the lease is not conformable to the leasing power in the settlement, but differs from, and is not so advantageous to the remainderman: and, *Lastly*, that the evidence of the former leases, which was received to prove that the clause of re-entry, in this lease, was conformable to the usual and accustomed form of clauses of re-entry, in leases of other land similarly circumstanced, both prior and subsequent to the settlement creating the power, was inadmissible for that purpose.—*First*, as to the grammatical construction of that part of the power on which this question arises. The words are by way of proviso, “So as there be contained in every such lease a power of re-entry *for* non-payment of the rent, thereby to be reserved.” In imposing this condition, the creator of the power has not used one word of reference, but used the indefinite article “a.” Though it may be said that this article may mean “some,” “any,” yet it cannot be contended that the condition would be satisfied by the insertion in such lease of some or any clause of re-entry of any kind whatever, and in any event, however remote and unlikely; for that would leave too little restraint upon the person who was to execute the power; in fact, it would leave him under no restraint at all. But it may be said, that by the words of the power being generally, “a power of re-entry,” was meant “any usual or reasonable” power of re-entry; that the creator of the power required a power of re-entry, without saying what power, and that he therefore left it in the discretion of the tenants for life to insert any

usual or reasonable power of re-entry in the lease. But this argument will proceed on an assumption altogether unfounded, *viz.* that the grantor merely required a power of re-entry, without saying what power; but he has said what power it should be: namely, that it should be a power of re-entry for non-payment of rent, and he has not left any thing to the discretion of the person who is to execute the power. It is true he has expressed himself generally, indeed so generally, that he has specified but one quality which he required the power of re-entry to have, namely, that it should be for non-payment of rent; but his having imposed this one condition only, is certainly no reason why a compliance with that condition should be dispensed with. The creator of the power has not said, that it shall be the usual power; nor that it shall be a reasonable one, but he has said, generally, that it shall be for non-payment of rent; and there ought certainly to be some very strong reason for so construing the power, as to dispense with the generality of the condition which he has annexed to its execution, and to substitute, in its place, a special or qualified condition, according to a discretion which he has not delegated nor entrusted to any one. Who is to judge what is a usual or reasonable power of re-entry? Is the tenant for life to do so? If he is, by what is he to be directed? Is it by reference to former leases, or to that which is generally usual, or generally reasonable? Where is the criterion to be found? That which may be usual in one part of the country, may not be so in another. That which may be usual generally, may not be the custom on this particular estate. What would be a reasonable time to allow for suspending the right of re-entry for non-payment of rent? If fifteen days be a reasonable time, would twenty-one, twenty-eight, forty-two, or sixty days, be a reasonable time? In many places rents are received

1819.
 ~~~~~  
 DOR  
 d. JERSEY  
 v.  
 SMITH.

1819.  
  
 DOE  
 d. JERSEY  
 v.  
 SMITH.

only one half year under another. In some great families the tenants are always allowed to retain a year's rent in hand; would an extension of the time to those periods be unreasonable? Is the Court to judge what is reasonable? If so, by what rule are they to be guided? Is the Jury to find the fact in every case, or is the question to be decided by the Judges in each as it shall arise? If so, case after case must be examined to ascertain the utmost limits of what is reasonable, a limit, beyond which nothing would be deemed reasonable, and the greatest confusion and uncertainty would be introduced into this head of the law, as has happened in the case of illusory appointments, in Courts of Equity (a); and the Court would have to regret in this case, as they did in those cases, (when it was too late) that they had ever deviated from the plain rules of simple grammar. The creator of the power, by omitting to use words of reference to former leases in this particular part of the power, though he used them in other parts of the power, has excluded all reference to former leases for this purpose. The words which are here used are also very strong: they are "a power of re-entry." The meaning of the word power is that which enables a man to do any thing; and here the word power not only has that meaning, but it imports a right accompanied with the means of re-entry. The word is not "a clause of re-entry," which is the word the creator of the power uses when he comes to speak of the leases at rack-rent, and which might, with greater plausibility, be argued to mean an authority to do the act, either under, or not under restrictions, but "*power*" which expresses something entirely absolute. Then the

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(a) See Lord *Alvanley's* doctrine on illusory appointments in *Kemp v. Kemp*, 5 *Ves. jun.* 849. *Butcher v. Butcher*, 9 *Ves. jun.* 382.

deed goes on to say, "*for*," not *on*, "nonpayment of the rent thereby to be reserved:" but the word "*for*" has precisely the same meaning as the word "*on*" would have had. "*On*," according to Doctor *Johnson*, in one of its senses, is a preposition denoting the time at which any thing happens. "*For*," according to the same authority, in one of its senses, means, "*because of*;" and according to Mr. *Horne Tooke*, in his *Diversions of Purley* (a), the word "*for*" means "*cause*," and nothing else; the word "*for*" therefore is synonymous, or nearly so, with the word "*on*" in the sense in which it is used in this place, at least it is quite as strong. A power of re-entry, "*on*" nonpayment of rent, would be a power authorizing re-entry on the happening of that event. A power of re-entry, "*for*" nonpayment of rent, would be a power authorizing re-entry for the cause of nonpayment of rent: now, as the rent would be payable at some time certain, the happening of the event, and the cause of the re-entry, would then both necessarily occur at one and the same time: the power of re-entry must attach at some time or other, and, in the absence of any direction to the contrary, it must attach at the same time when the cause for it occurs.—Upon the first point, therefore, the words, "a power of re-entry for nonpayment of rent," mean, *first*, a power which shall be general and absolute, and shall give a right of re-entry on the occurrence of the default; and, *secondly*, one which is unlimited and unclogged with any condition: but it is not necessary, for the purposes of this particular case, to go the length of both parts of this proposition: it is enough to establish the second, namely, that it means one that is unlimited and unclogged with any condition. *Secondly*, as to the meaning and intention of the creator


1819..  
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 DOB
 d. JERSEY
 v.
 SMITH.

(a) Vol. I. 2d. edit. 366.

1819.
DOE
d. JERSEY
v.
SMITH.

of the power, to be collected from the words, and the object of the whole of the power, considered both collectively and in its separate parts. And first, as to the words of the power: the power is threefold; it is for letting, first, at customary rents, secondly, at rack rents, and, thirdly, for letting mines. First, with respect to those parts of the estate which were then leased for life or lives, or for years determinable on the dropping of a life or lives; it authorises the granting of leases to any person or persons in possession, or reversion, for one, two, or three lives, or for any number of years determinable on the dropping of one, two, or three lives, under a number of conditions and restrictions, each of which is introduced by the words, "*so as* there be not more than three lives at once in each lease;" "*so as* there be reserved the ancient and customary yearly rents, duties, and services; or more, or as great or beneficial rents, duties, and services, or more, as then were, or at the time of demising the premises, should be reserved and made payable in respect thereof, except heriots," (which might be compounded for, according to the will and pleasure of the lessor.) It is here to be observed, that where the creator of the power chose to make a reference to former leases, he has done so, as in the instance of requiring that there should be reserved the ancient and accustomed rents, &c., as then were, or at the time of demising the premises, should be, reserved and made payable in respect thereof; where he chose to give a discretion to the tenants for life, as in the case of heriots, he did it; but in requiring the power of re-entry, he neither referred to the former leases, nor to the usual clause of re-entry (if indeed there be any such thing), nor did he use any words importing a discretion to be exercised by the several tenants for life, but he expressed himself absolutely, "a power of re-

entry for nonpayment of rent," and went on with other absolute conditions in the same manner; "*so as* the lessees be not by any express clause freed from impeachment of waste, and *so as* they do seal and deliver counterparts of their leases." Secondly, the power of granting leases at rack rent, which is also subject to certain conditions and restrictions, namely, *so as* the lessees be not by any express clause freed from impeachment of waste, and *so as* they do execute counterparts of their leases, and *so as* in every such lease for any term of years absolute respectively, there be contained not a *power*, but a *clause* of re-entry, in case the rent or rents thereupon to be reserved be behind or unpaid by the space of twenty-eight days, after the times thereby respectively appointed for payment thereof. Therefore where the creator of the power thought fit to extend the time for re-entry beyond the day appointed for the payment of the rent, he did it: clearly proving he was well acquainted with the practice of doing so in some cases, and he adopted that practice in this, which is the only case where he thought fit to do so. Thirdly, as to the power of leasing mines for thirty-one years. These also were to be leased, under certain conditions and restrictions, introduced by the same words, *so as* the lessees be not by any express clause freed from impeachment of waste, and *so as* they do execute counterparts of their leases, and *so as* there be also inserted such proper and usual covenants for the effectually winning and working the said mines, and smelting the ore, and doing all other proper and necessary acts, as are usually inserted in leases of the like nature. The material observation that arises on this part of the power is, that in a former part of it, where the donor thought fit to do so, he referred to the former leases which would

1819.

 Doe
 d. JERSEY
 v.
 SMITH.

1819.
 {
 DOE
 d. JERSEY
 v.
 SMITH.

constitute a particular class or particular classes of cases, but that here he has referred to what is generally usual:—On the words therefore, of the whole of the power, considered both collectively, and in its separate parts; from the donor's having in certain cases referred to former leases as to the ancient and accustomed rents, his having given a certain discretion as to heriots, his having in other cases, extended the time for re-entry till twenty-eight days after the day on which the rent was made payable, and finally, his having in other cases referred to what was generally usual, it is impossible to argue for the annexing of any limitation or restriction, to any of the conditions which he has made in their terms absolute and general. The maxim "*Expressum facit cessare tacitum*" is here particularly applicable. Could any limitation or restriction be imposed on the condition of tenants executing counterparts of leases, such, for instance, as that there should be a tender of them on or before a particular day? Could the right of re-entry in the lease at rack-rent, which is extended to twenty-eight days, be farther extended to forty-two, or even to a single day beyond the twenty-eight? Certainly not; and yet neither of these would be greater deviations from the terms of the power, than the extending the time of re-entry where it is general, from the day when the rent would become due, till fifteen days afterwards; and certainly not so great a deviation as the superadding to the power of re-entry the limitation or restriction that there should be no sufficient distress on the premises. [Mr. Baron *Graham*.—Then this clause should be that if at any one day the rent should not be paid, the right of entry would accrue.] Not so, because it should be a general and absolute power, unqualified with any condition: it is alone sufficient that it is not to be clogged with the condition of there

being no sufficient distress on the premises. It is sufficient to say thus much of the meaning of the creator of the power, as it is to be collected from the words of this particular part of the power, which must not only be allowed their fair and natural meaning, but must not be allowed more than that; but if we are at liberty to look from the words, to the object of the power, for the intention of the creator, it will not be difficult to find many reasons for supporting the construction for which the plaintiff contends. Powers of leasing are, generally speaking, intended for the benefit of the estate, for the mutual advantage of the possessor and successor: but where conditions are imposed on the execution of them, they are so imposed either to protect the remainder-man from a charge in any other mode, or to protect the persons to whom the power is given, from a hasty and unadvised execution of it. Here, the particular restriction under consideration was introduced for the benefit of the remainder-man; the power itself is extremely prejudicial to him: it authorises the granting of leases, not only in possession, but in reversion, for three concurrent lives, or for ninety-nine years determinable on three lives, at very small and inadequate rents, on the granting of which leases, the tenant for life is entitled to get what he can by way of fine; there is, therefore, the strongest reason, as respects the remainder-man, why this condition should not only be general and absolute in its terms, *but unclogged and unlimited with any condition whatever*. With respect to the rents, duties, and services, the donor uses these words of reference, "*ancient and accustomed yearly rents, duties, and services*;" but in requiring a power of re-entry, he drops these words of reference, and uses words of an import, which negatives and excludes any such re-

1819.

 DOE
 d. JERSEY
 v.
 SMITH.

1819.

~

DOE

d. JFREY

v.

SMITH.

ference. Why then, it may be asked, did he do so? Certainly the strong presumption is, that he did so, because he intended to do it: that he understood the language he was using. He appears to have had the former leases in his contemplation, and may be supposed to have been dissatisfied with the clause of re-entry, which they, or at least some of them, contained, and to have determined to have a new clause different from that contained in them, and which should enable the landlord to re-enter on a certain condition, not to be found in some of the former leases of the same land, or in any other specific class of leases, to which he chose to refer; and, having this object in view, what would be the language he would use? Would he not be driven from the use of any word of reference? And must he not have used the indefinite article "a," (which indeed always must be used when a particular class is not referred to), and must he not then have added the condition, on which he thought fit that the right of re-entry should accrue? Now, is not this the precise line of conduct, which has been pursued in the creation of this power? First the creator of the power says, the lease must contain a power of re-entry, and then states the condition, on which that power is to be exercised, namely, on nonpayment of the rent. That the creator of the power was so dissatisfied with the clauses of re-entry in former leases, and annexed this condition to the leasing power, in order to introduce one, more to his satisfaction, is not a matter of remote, and barely possible supposition; nor does it derive its probability merely from the remarkable fact of his having, after referring on several other occasions to the former practice, as soon as he came to speak of the power of re-entry, ceased to make such reference, and expressly stated the condition on which it should accrue; but it is strongly confirmed

by the very nature of this kind of lease. Where the rent is of inconsiderable value, or the property of small extent, a clause conditioned for re-entry, on failure of distress, is an adequate security for the rent; for the landlord would have no difficulty in shewing that there is no sufficient distress, and he will be in little danger of being turned round at the trial of an ejectment for a forfeiture, by a proof of a sufficient distress being on the land. But it is evident, that the value of the security for the rent diminishes precisely in proportion to the extent of the land, and the smallness of the rent; and where a farm of several hundred acres is let at a rent of £2 *per annum*, the security of a clause of re-entry given in the absence of a sufficient distress only, becomes, practically speaking, worthless. No prudent landlord would bring an ejectment for a forfeiture when he would be liable to be defeated, by his tenant shewing that there was, upon a space of many hundred acres (of wild open mountain, for instance), a distress to the value of £1, which is the half-year's rent under the present leases. In short, an estate of five hundred farms, let at £2 *per annum* each, would, with a strict clause of re-entry, be worth £1000 *per annum*; with a conditional one, it would be worth almost nothing; the rents would be scarcely worth collecting; certainly not by distress, where the *extra* expense of the distress would exceed the amount of the rent to be recovered. Another strong reason for requiring the rent to be payable at the day, arising out of the nature of the estate, is the importance to the owners of such an estate keeping up a constant recognition of tenancy by the lessees. Suppose the counterpart of a lease to be lost, and the tenant for life to have omitted for twenty years to receive the rent, how would the remainder-man be enabled to make out his title to the estate? He would, at least, be under consid-

1819.

 Doe
 d. JERSEY
 v.
 SMITH.

1819.
 {
 Doe
 d. JERSEY
 v.
 SMITH.

able difficulties in doing so. This, it may be said, might also happen, if the clause of re-entry were not general and absolute, and if it were restrained and clogged with a condition of a deficiency of distress; undoubtedly it might so, but a clause authorizing a re-entry, only in the absence of a sufficient distress, not being so penal and so strict as one which is unlimited and unclogged with such a condition, would not be so likely to be attended to as the latter, and to produce that constant recognition of tenancy which it was obviously the interest, and, as may fairly be argued, the intention also, of the creator of the power to keep up. Then, if it should be said, that this strictness cannot be contended for in the case of these small rents, because in the case of rack-rents the time of payment is postponed for twenty-eight days, it may fairly be answered, that the creator of the power presumed that the tenants must always be prepared to pay these small rents, and therefore required that they should be punctually paid; not only that there might be a constant recognition of tenancy, but in order that they should be paid with as little trouble as possible to the owners of the estate; as in the case of toll, for instance, which is of great importance when collected at the moment, but of no value if the gate-keeper had to send to a distance for it. Whereas, with regard to the rack-rents, which it might be supposed the tenant would not always be ready to pay at the day, it was reasonable that an extension of time for twenty-eight days should be given. It may, perhaps, also be said, that the construction of the power contended for by the plaintiff is unreasonable and inconvenient; and that it never could be intended by the creator, inasmuch as its effect would be, that a tenant for lives, or for a long term of years, determinable on lives, might be instantly ejected the moment his £1 half-year's rent was in arrear; whereas upon rack-rent being in arrear, on leases for

years absolute, and where the rent might be of some valuable amount, the power does not allow a re-entry till after it should be in arrear twenty-eight days; and consequently, that it would be making the rigour of the rule extreme, where there was the least ground for it; but many reasons have been shewn why the rule should be extreme in the case of these rents, which are small and inadequate to the value of the premises. It may be further said that the tenure is of a degrading nature; but it is not so. The estate of a tenant, under such a lease as the present, would be simply an estate upon condition, of which an instance is put by *Littleton* (a), and before the landlord could enter for the forfeiture, he must make a demand of the rent, on the day, and at the place, with all the formalities required by the common law; and the quality of the estate, whether degrading or not, would remain precisely the same, whether the right of re-entry were made to attach on the day after the default occurred, or were extended till after the expiration of the fifteen days from that time. This argument of the degrading nature of the estate indeed assumes too much;—it begs the whole of the question, and requires, not only that the power of re-entry shall be extended for fifteen days, but also that there shall be no power of re-entry at all where there is a sufficiency of distress, which is directly contrary to the case of *Coxe v. Day* (b). In addition, therefore, to the arguments derived from the grammatical construction of the words of this particular part of the power, it appears from the whole of it, taken both collectively, and in its separate parts, that it was the meaning and intention of the creator, as well from the words, as from the object of the power, that the right of

1819.
 }
 DOE
 d. JERSEY
 v.
 SMITH.

(a) Sect. 325.—(b) 13 East, 118.

1819.
 }
 Doe
 d. JERSEY
 v.
 SMITH.

re-entry in this particular case should be general and absolute in its terms, or at least that it should be unlimited and unlogged with any condition. *Thirdly*, as to the rule by which this power, and, in particular, this part of the power, is to be construed. The first question in the construction of powers, as well as of all written instruments, is, what was the intention of the parties? This intention is to be collected from the words which they have used; every word is to be taken according to its common and natural import, and in deeds more especially, according to its strict grammatical signification. If the words be clear, the rule with regard to powers in general is, that they are to be construed strictly according to their words. There are a variety of cases in which particular expressions, imposing restraints on powers, or modes of executing them, have received a judicial exposition, and in which the Courts, though they have said they cannot dispense with the form prescribed, have inclined to put a liberal construction on the words of the power; but no case, with the exception of *Holley v. Scott* (a), can be referred to, nor can any principle be extracted from any other case, which will warrant the construction contended for on the part of the defendant.—That powers are in general to be construed strictly according to the words, when those words are clear, has been established by several cases, a summary of which are collected and referred to by Mr. *Sugden*, in his *Treatise on Powers* (b), wherein he refers to the authority of a decided case for every one of the conclusions he has arrived at, and the propositions he has there laid down. What was said by Lord *Ellenborough* in his judgment in the case of *Hawkins v. Kemp* (c), is well worth particular attention,

(a) *Lofft*, 316.—(b) *2d Edit.* 205.—(c) *3 East*, 439.

as to what shall be deemed a good creation of a power. But, perhaps, the strongest cases that can be cited on this point, are those of *Wright v. Wakeford* (a), *Doe d. Mansfield v. Peach* (b), and *Wright v. Barlow* (c); in all of which, it was held, that under a power to be executed by writing under hand and seal, and attested by two or more credible witnesses, a writing so attested as to the sealing and delivery, but not as to signing, was not a good execution of the power, although in point of fact it was, at the time of execution and attestation, also signed by the party executing it; and such is the respect with which the conditions imposed by parties are regarded, that even the legislature, when they passed the act of the 54 Geo. 3. (d), for the express purpose of curing this defect, gave it only a retrospective operation, leaving the power, and the law applicable to its execution, just as it stood before, as to all future cases.—The observations hitherto made, apply to powers in general; and it will not need argument to shew, that powers of leasing are to be construed by any other rule than that of the intention of the parties.—That this is, and always has been, the only rule applicable to this subject, cannot be doubted; and Lord *Kenyon*, in commenting upon it, in the case of *Pomcroy v. Partington* (e), said, “If the Judges, in construing the particular words of different powers, have appeared to make contradictory decisions at different times, it is not that they have denied the general rule, but because some of them have erred in the application of the general rule to the particular case before them; for in all the cases, they profess to determine upon the intention of the parties.” “It is not necessary,” his Lordship added, “to go into all the cases, because

1819.
DOE
d. JERSEY
v.
SMITH,

(a) 4 Taunt. 213.—(b) 2 Maule & Sel. 576.—(c) 3 Maule & Sel. 512.—(d) Cap. 168.—(e) 3 Term Rep. 674.

1819.
 {
 DOR
 d. JERSEY
 v.
 SMITH.

they are all arranged in that of *Goodtitle d. Clarges v. Funucan* (a), and the due effect is there given to them by Lord Mansfield, from all of which he at last extracts the general rule, that the construction of powers must be governed by the intention of the parties." To apply this rule to the present case; this particular power of leasing for lives, or years determinable on lives, in reversion as well as in possession, at small and very inadequate rents, and where a fine is paid to the lessor, though it may be beneficial to the tenant for life, is extremely prejudicial to the estate and interest of the remainder-man; and any condition imposing a restraint upon the execution of such a power, is introduced for the benefit of the remainder-man. That proposition is self evident. It is therefore from this application of the rule, "that the intention of the parties is to prevail," to the subject-matter of this power, that the argument for the rule, which, it is submitted, is to be applied to the construction of this particular part of the power, *namely*, that it is to be construed strictly, is drawn. It is not put on grounds or reasons of equity or policy, for it is adopted from what was said by Lord Mansfield in the case of *Goodtitle d. Clarges v. Funucan* (b), who observed, that "there is no ground or reason of equity or policy between the tenant for life and the remainder-man for leaning on either side." It is therefore to be put on the sole ground of the intention of the creator of the power. The nature of this particular power, as it affects the estate and the respective interests of the tenant for life and remainder-man, has already been observed on, each of whom were equally the objects of the regard of the creator of the power. The condition is imposed by the words "*so that*," which words import a condition precedent, and a limitation, as was held even in

(a) 2 Doug. 565.—(b) *Id.* 573.

the case of the Crown on the construction of the stat. of 33 Hen. 8. (a) in the case of the *Attorney General v. Andrew* (b). If this condition, therefore, were utterly matter of form, the Court could not dispense with it; but it is not matter of form alone, it is more. In the case of *Fitzgerald v. Lord Fauconberge* (c), which was decided by the Lord Chancellor, assisted by the Master of the Rolls and Chief Baron *Reynolds*, the Master of the Rolls said (d), "In the exposition of deeds, one general rule is to be observed, viz. the party's intention, so far as it stands with the rules of law;" it will make "or," a copulative or disjunctive, it will give two negatives an affirmative signification (e). It is to prevail in the raising and direction of uses (f). In things of this nature it is principally to govern the construction (g). There has been a great variety of opinions in the construction of powers; formerly they were looked upon as odious, as tending to defeat the grant. The difference in *Englefield's* case (h), between personal individual conditions, which cannot be performed by any person but him that reserves them, and such which are not inseparably annexed to the person, and so may be performed by any other, will hold in powers of revocation, which are in nature of conditions; another difference has been taken between a power, reserved to the owner of the estate, and a naked power granted to a stranger, which may charge a third person's estate. There is a difference also between a power reserved to the owner of the estate, and a power granted to the donee of a particular estate, as a power to a tenant for life to make leases, which can have no foundation but in the will of the donor, and must be taken strictly in favour of the remainder-man; but the

1819.
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 DOB  
 d. JERSEY  
 v.  
 SMITH.

(a) *Cap. 39. s. 53.*—(b) *Hardres, 23.*—(c) *Fitzgib. 207.*—(d) *Fitzgib. 219.*—(e) *1 Inst. 146. b.*—(f) *1 Inst. 49. a.*—(g) *1 Vent. 280.*—(h) *7 Rep. 13. a.*

1819.  
  
 DOE  
 d. JERSEY  
 v.  
 SMITH.

owner's power is to be construed liberally, as part of his ancient estate, *Kibbet v. Lee* (a). Yet that book says, that "all circumstances and forms prescribed must be observed."—So, also, in *Orby v. Lord Mohun* (b), which was heard before Lord Keeper *Couper*, and the Chief Justices *Holt* and *Trevor*, where the power was to grant leases of all lands anciently demised, at the ancient rents, and of the other lands at the best rents that could be gotten, and which case is scarcely distinguishable from the present:—The power there was exercised by two leases, by one of which all the lands not anciently let were demised, reserving thereon "the best improved rents," and by the other, all the lands within the power were let, reserving the "ancient and accustomed rents;" so that instead of specifying the sums to be paid as rent, the words of the power were repeated, and Lord Chief Justice *Trevor*, after shewing how the reservation would be good, and the lease at all events so, whether the reservation were good or not, for the purposes of recovery by tenant in fee, said, "But in this case there must be such a reservation as may, or shall be, and is effectual to all intents and purposes, and must not be by any means uncertain, and by this lease the remainder-man possibly may, or may not be able, to ascertain and prove what is the ancient rent, and aver that such a sum as he avows for, is the ancient rent reserved: so that he is under a necessity of doing all these things, and if he fails in any one of these, he cannot recover his rent; and it may not be in his power so to do, for it depends upon evidence, which is uncertain, and upon matter of fact, which is also uncertain; and it may be, the rents anciently reserved were not the same rents at all times, but some-

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(a) *Hobart*, 312.—(b) 3 *Chan. Rep.* 56. *S. C. Sugden on Powers*, 2d ed. 613.

times greater, and at other times lesser rents reserved; and this power is over lands where fines have been taken, and consequently the rents must be more or less, according to the greatness or smallness of the fines; and no doubt, on the trial, the tenant may shew that another rent than what the remainder-man avows for was actually reserved, and so nonsuit him upon the evidence as often as he shall think fit to contest it, whereby he may come to lose his rent." This *dictum* is particularly applicable as to there not being a sufficient distress on the premises, because of the generality or the uncertainty of such reservation of the rent, this lease cannot be good against the remainder-man. It is true that Lord Chief Justice *Holt* there differed from Lord Chief Justice *Trevor*, and observed (a), "It has been said that a power of this nature ought not to be taken favourably, it being in prejudice of the remainder-man; I confess I know not why; for if he that would have otherwise been tenant in fee, became tenant for life by such a settlement, whereby that power is reserved to him, that would have descended with the fee, it ought to be taken beneficially for him, and that power has a relish of the ancient fee:" but his Lordship afterwards added (b), "Indeed he must pursue circumstances, and the form prescribed, as such a reservation, counterpart, &c." But Lord Keeper *Cowper*, differing in opinion with Chief Justice *Holt*, and agreeing with Chief Justice *Trevor*, said (c), "That the reservation and deed being to be made upon a restraint of the power, must be taken strictly against tenant for life, because of the limited acts he is to pursue; and liberally for the remainder-man, because that restraint was intended for his benefit; and there are multitudes of authorities in the books, that such a limited power must be taken strictly against the

1819.  
  
 Doe  
 d. JERSEY  
 v.  
 SMITH.

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(a) 3 *Chan. Rep.* 69.—(b) *Id.* 70.—(c) *Id.* 73.

1619.  
 ~~~~~  
 DOE
 d. JERSEY
 v.
 SMITH.

tenant for life ; because, though the power be for the benefit of the tenant for life, yet the restraints are put upon him for the benefit of the remainder-man ; and if we should go on both the reasons together, it must still be taken for the benefit of him in remainder : and for this I insist on the reverse of the reason in *Mountjoy's* case (a). That was an estate tail created by Parliament, and he had a narrower power by the act than the law would have given him as tenant in tail ; therefore, that must have a reasonable construction according to the meaning of the act ; *vice versâ*, here the power of the tenant for life is by way of enlarging the estate, and being in augmentation of it must be taken strictly, and so must it be taken according to natural reason. Now according to that, this cannot be a good lease to bind the freehold and inheritance of the remainder-man ; for in construction of deeds, the true genuine sense and meaning of the parties must be attended to, so we must consider each part of the power in the deed." And in another part of his judgment, his Lordship said (b), " This lease as against the lessor is not void ; but as against the remainder-man it is, because not so beneficial as usual ; and a very minute difference will serve to avoid it, which might have been prevented in pursuance to the settlement, by reserving more than the ancient rent ; but here is none ; and if there be, it must have all the beneficial qualities of the rent anciently reserved ; and those ought to be reserved and observed, as in *Mountjoy's* case it is said," and there are several cases for want of that which are denied to be law, as silver for gold, or two rents or two manors conjoined, as part of the manor for an apportionable share or part of the rent ; as if twenty acres had been let for £20 each acre of equal

(a) 5 Rep. 3. 6.—(b) 3 Chan. Rep. 75. 5 Rep. 4. b.

value, it is not a good lease, if ten of those that were even to be let at the rent of £15, such a lease would be void." So, in *Campbell v. Leach* (a), Lord Chief Justice *De Grey*, speaking of a power of leasing, said, "This power is of a mixed nature, not like a power of jointuring, or powers for raising money. But this is for the benefit of the tenant for life and the remainder-man. If executing this power is for the benefit of the remainder-man, it should receive a liberal construction; but if the tenant for life invades the interest of the remainder-man, in order to benefit his own only, it should have another construction." It would be very easy to multiply references upon this point; but it will be sufficient to advert to what was said by the late Master of the Rolls, Sir *William Grant*, in *Holmes v. Coghill* (b), which, though the facts of that case do not bear upon this, appears to be very applicable to the point now under consideration. His Honour there said, "Upon the second point, there is an evident difference between a power and an absolute right of property; not so much with regard to the party possessing the power, as to the party to be affected by the execution of it. If our attention is to be confined to the former entirely, there is no reason why the money he has a right to raise should not be considered his property, as much as a debt he has a right to recover. But the latter can only be charged in the manner, and to the extent specified at the creation of the power. The compact is not to raise £2000 absolutely, and in all events; but, that it may be raised in a certain manner, viz. according to his appointment by deed or will to be duly executed and attested by two or more witnesses. To say that without a deed or will, this sum shall be raised, is to subject the owner of the estate to a

1819.
DOE
d. JERSEY
v.
SMITH.

(a) *Ambler*, 748.—(b) 7 *Ves. Jun.* 505.

1819.
 {
 DOE
 d. JERSEY
 v.
 SMITH.

charge in a case, in which he never consented to bear it. The chance that it may never be executed, or that it may not be executed in the manner prescribed, is an advantage he secures to himself by the agreement, and which no one has a right to take from him."—According, therefore, to all the rules on the construction of powers, and the principle upon which those rules are founded, this particular part of the power ought to be construed strictly; and, consequently, the power of re-entry, which it requires, is one that is general and absolute, or at least that it be unlimited and unclogged with any condition.

Fourthly, the proviso for re-entry in the lease is not conformable to the leasing power in the settlement, and is not only different from it, but is not so beneficial to the remainder-man. The special verdict, after stating the lease in question, which was granted in consideration of a fine of £105 for ninety-nine years, if three persons should so long live, at and under the yearly rent of £2, payable at *Michaelmas* and *Lady-day*, by equal portions, and other duties and services, proceeds to set forth, *first*, a covenant by the lessees to pay, do and perform the said yearly rent of £2, and the duties, heriots, suits, services and other reservations at the times, and in manner therein limited for payment and performance of the same; and, *secondly*, the proviso upon which the present question turns.—This proviso is twofold; *first*, it applies to the rent, and other reservations, for the payment and performance of which, particular times were appointed; *secondly*, it applies to the reservations, covenants, and agreements generally, for the performance of which no particular times were appointed. Very little argument is necessary to shew that the latter part of the proviso does not apply to the rent, and that, even if it did, it could not control the former part of the proviso. And,

first, the position, that the latter part of the proviso does not apply to the rent, may be tried by this simple test. Suppose half a year's rent to be due to the landlord; could he, after making a legal demand, with all the formalities required by the common law, maintain an ejectment for the recovery of the premises, if there was a sufficient distress thereon? It is quite impossible to contend, that such an ejectment could be successfully maintained, and that the tenant, who was expressly protected from forfeiture by a special clause, providing he should not incur it for non-payment of rent, while there was a sufficient distress on the premises, could be deprived of this benefit, given him by positive stipulation, by the general words of a subsequent proviso for re-entry on breach of covenant, although there is a covenant undoubtedly in the lease that he shall pay these rents, according to the reservation; and this would be the true construction, even if the subsequent proviso were more particular than it is, and were it even expressly contradictory to the first; and two well-known rules of construction would warrant this position; *first*, that in a deed where there are two clauses, of which the latter is contradictory to the former; there the former shall prevail. *Cotter v. Merrick* (a); and, *secondly*, "that subsequent clauses, which are general, shall in *deeds* be governed by precedent clauses, which are more particular;" and *Thomas v. Howell* (b) is there cited in its support; but it is laid down more correctly by Lord Coke, in *Altham's case* (c), in these terms:—"Generalis clausula non porrigitur ad ea quæ antea sunt specialitèr comprehensa." All the cases on

1819.
 }
 DOE
 d. JERSEY
 v.
 SMITH.

(a) *Hardres*, 69.—(b) 4 *Mod.* 69.—(c) 8 *Rep.* 154. b.

1819.
 }
 DOE
 d. JERSEY
 v.
 SMITH.

this subject are collected in *Viner's Abridgment* (a). But it is unnecessary to have recourse to these maxims:—the subsequent general clause will not be rendered inoperative, by giving the fullest effect to the previous special one; it will still apply to the breach of the various other covenants and agreements contained in the lease. It is to be observed, that the word “*rents*” does not occur in this general proviso: the words are “*reservations, covenants, and agreements.*” At any rate, the general clause, when it speaks of “*reservations, covenants, and agreements hercinbefore mentioned,*” must be understood to be providing a remedy by re-entry for the breach of such as had not been specially provided for before, or at least to speak of them, subject to all previously mentioned restrictions and qualifications. Enough probably has been said to shew that the effect of the special clause in this lease is not destroyed by the subsequent general proviso, and that the landlord having stipulated for a re-entry, only in the case of there being no sufficient distress on the premises, could not recover in ejectment for non-payment of rent, if there were a sufficient distress on the premises; and, consequently, that if the Court shall be of opinion that the condition annexed to the leasing power is not satisfied by a power of re-entry for non-payment of the rent only, in the event of there being no sufficient distress on the premises, the plaintiff in error will be entitled to judgment.

Next, as to the consideration of the clause for re-entry in the lease as compared with the leasing power in the settlement of 1757;—an absolute power of re-entry on non-payment of rent is somewhat different in effect and substance from a power to re-enter on failure of distress.

(a) *Tit. Grant. H. 13.*

On the first of these points, that a qualified is substantially different from an unqualified power of re-entry, it would not be necessary to say any thing, were it not contended on the other side, that the qualified power of re-entry was as beneficial to the landlord as the unqualified one; the contrary of which proposition carries with it its own demonstration. It is even unnecessary to shew that the absolute is more beneficial to the landlord than the qualified power; but it is sufficient for the plaintiff to shew that it is different. The creator of the power had a right to annex what conditions he pleased to his grant: it is no answer, when it is objected to a pretended execution of the power, that the conditions have not been fulfilled: to say, it is true the conditions have not been fulfilled, but something equally beneficial to the party for whose benefit they were imposed, has been done; but it may be safely asserted, that this is not equally beneficial to the remainder-man. Many cases have been put to shew that this qualified power of re-entry was not only different from, but not so beneficial as, a general power of re-entry; one, however, may be considered sufficient. Suppose the tenant for life to die after the day appointed for payment of the rent, and before the time limited for re-entry, the remainder-man would have no right to enter till that time; suppose him also to die after the day of payment, and before the time limited for the re-entry, he would lose the right of granting a renewed lease, and the fine which he would have received thereon. But the difference between a general right of re-entry for non-payment of rent, and one clogged with a condition of there being no sufficient distress on the premises, is the principal point in this case. Where a lease contains an absolute power of re-entry, the statute (a) enables the land-

1819.
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 DOR  
 d. JERSEY  
 v.  
 SMITH.

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(a) 4 Geo. 2. c. 28. s. 2.

1819.  
 DOK  
 d. JERSEY  
 v.  
 SMITH.

enter for the non-payment of the rent, does yet contain a power of re-entry for non-payment of rent; not indeed an actual power, enabling the lessor to re-enter for the non-payment of the rent, but a reasonable and usual power, which does not enable him to do so, at least not, in case there is a sufficient distress on the premises; because in that case he will have no right to enter at all: not a proximate and immediate power, but a remote and possible power of re-entry, which are undoubtedly two very different things. The argument at first appears ingenious, but it is perfectly sophistical and unfounded. To this may be added that well known maxim—" *Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba expressa fienda est (a).*" On this part of the case, therefore, the proviso for re-entry in the lease is not conformable to the leasing power in the settlement, and is not only different, but not so beneficial to the remainder-man.

*Lastly*, as to whether the evidence of the former leases, which was received to prove that the clause of re-entry in this case was conformable to the usual and accustomed form of clauses of re-entry in leases of other lands similarly circumstanced, both prior and subsequent to the settlement creating the power, was or was not admissible for that purpose. This question divides itself into two heads; *first*, whether, under the terms of this power, the Court has a right to judge whether this be a reasonable execution of it: and, *secondly*, whether the evidence which was received was admissible. The first point has been already considered under the first and second questions; namely, the grammatical construction of this particular part of the power, and the meaning and intention of the creator of it, as it is to be collected from the words and object of the whole of

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(a) 2 Wms. Saund. 167.

the power considered, both collectively and in its separate parts. But upon the second, namely, as to the admissibility of the evidence, this question being for consideration in just the same manner, as if it had been presented to the Court in the shape of a bill of exceptions, on the express point whether such evidence were admissible or not, the plaintiff contends that such evidence was not admissible, and cannot be taken into consideration by the Court in giving judgment. The learned Baron (a) who tried the cause, when he received the evidence, invited the counsel for the plaintiff to tender a bill of exceptions upon its admissibility, and this was acceded to; but it was afterwards abandoned, because it was properly conceived that the question of the admissibility of this evidence would be equally raised for the decision of the Court on this special verdict, as it would have been on a bill of exceptions. It must therefore be so considered. The proposition that this evidence was not admissible, depends upon a very plain principle, *namely*, that there was no occasion for it. There is no ambiguity of any kind in the words of this particular part of the leasing power, nor any word of reference of any kind, to any other clause of re-entry either generally usual, or unusual, on this particular estate. Upon what principle then can any extrinsic evidence be admitted to explain that, which neither requires, nor admits of any explanation: if any such is admitted, it must be upon some principle, which will constitute an entire new head in the law of evidence. The cases in which extrinsic evidence has been held to be admissible, are either those where the expression is in itself ambiguous, which has been farther restricted by a well known maxim of law, which since the time of Lord *Bacon* has never been denied, to the case of a latent ambiguity, which he defines

1819.  
  
 DOE  
 d. JERSEY  
 v.  
 SMITH.

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(a) *Mr. Baron Wood.*

1819.  
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 DOB
 d. JERSEY
 v.
 SMITH.

may now be taken to be, that extrinsic evidence, either of deeds or of any other matter of fact, is not admissible to explain an expression in a written instrument, unless there be either a latent ambiguity, or a necessary reference thereto. In the present case, there is neither an ambiguity of any kind, nor any word of reference to any former lease, but on the contrary the total exclusion of any such reference. The mischief which the letting in such evidence is calculated to produce would be infinite; the uncertainty which it would create, and the danger to which it would expose both the lessor and lessee, would be extreme. In the first place, it would not be enough for the tenant for life to look to his leasing power for his right to grant leases, but he must look back to counterparts of former leases for fifty or one hundred years, to see that the leases which he is about to grant are conformable thereto; if he must do this, the remainder-man may do so; and if it should turn out that the lease was not in the usual form, it might be avoided, though it was entirely conformable to the strict words of the power: the tenant would never be safe; and as he could have no means of referring to former leases, he could never safely execute an assignment of his interest to any one. The Jury have found, by this special verdict, that the usual and accustomed form of leases of the estate contained in the settlement of the 2d July, 1757, granted for lives, or years determinable on lives, as well prior as subsequent to that settlement, contained a conditional proviso of re-entry similar to that contained in the lease of the 5th September, 1803: they have not found that it was the uniform or universal, but the usual and accus-

(a) 3 *Ves. Jun.* 690.—(b) 6 *Ves. Jun.* 232.—(c) 9 *Ves. Jun.* 325. *S. C.* 7 *East*, 237. 2 *New Rep.* 449.

tated proviso of re-entry in similar leases. They have not even found that it is a reasonable proviso for re-entry. But a usual and accustomed proviso is not necessarily a reasonable proviso for re-entry: so far are these two provisos from meaning the same thing, that it may so happen they may be directly opposed to each other; that which is usual and accustomed on this estate may be highly unreasonable, and even unusual, as applied to others. This finding of the Jury was founded on the production of a given number of former leases: another Jury might draw a different conclusion from the same evidence, or they might be furnished with a greater body of evidence, which would warrant a different finding. It is the interest of the personal representatives of the late tenant for life to support his act; because, if the leases which he has granted should be set aside, they would be liable in damages to the lessee. The possession of the counterparts of the expired leases is to be sought for from them, as being in their custody: and they would be interested in keeping back such as would make against them, and in producing those only which would make for them. Is the remainder-man to be subjected to such an inconvenience, or to such an act of injustice as this? The case of *Orby v. Lord Mohun* (a) is a direct authority that he is not. Upon the terms, therefore, of the power, which are not doubtful, upon every principle of the law of evidence, as applied to this subject; upon every principle of convenience and justice, the evidence of the former leases, which was received to prove, that the proviso for re-entry in this lease was conformable to the usual and accustomed form of leases of other lands similarly circumstanced, both prior and subsequent to the settlement creating the power, was not

1819.
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 Doe
 d. JERSEY
 v.
 SMITH:

(a) 3 *Chan. Rep.* 56.

1519.
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 DOE  
 d. JERSEY  
 v.  
 SMITH.

admissible for that purpose, and ought not to be taken into consideration by this court in giving judgment.— Among the cases which more immediately bear upon the present, the principal one is that of *Hotley v. Scott* (a), which is scarcely to be regarded as an authority for the defendant; it is so loosely reported that it is difficult to understand the effect of the decision. The words of the power in that report are “in case of rent behind, or want of sufficient distress.” But it appears more correct to suppose that the phrase used was “and want of sufficient distress.” Lord Chief Justice *Mansfield* is there made to say, “As to demand, a clause of re-entry is required as a security for the rent: demand is requisite both by the common law and by statute.” This expression, which his Lordship never could have used, is merely mentioned to shew the inaccuracy of the report. “A clause of re-entry,” continued his Lordship, “will never be allowed to operate farther than as a security for rent;” a proposition which is not law. But the important observation arising on this case is, that, according to the printed report of the case, Lord *Mansfield* does not appear to have adverted to the condition as to want of a sufficient distress, which certainly was the most difficult part of the case. The case of *Coxe v. Day* (b) is a direct authority for the plaintiffs, and cannot be distinguished from the present: one of the questions there was, whether a lease with a clause for re-entry on non-payment of rent for twenty days, in case there was no sufficient distress on the premises, was conformable to a leasing power, which required a proviso for re-entry on non-payment of the rent for twenty-one days, unclogged with any condition; and the Court held that it was not, as being less bene-

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(a) *Lofft*, 316.—(b) 13 *East*, 118.

ficial to the remainder-man than an absolute power of re-entry on non-payment of rent. The authority of that case has not hitherto been disputed: it is admitted, that it would have been in point, had the question arisen on the second branch of the power, *namely*, the leases at rack-rent: how, then, is it less in point on the first, excepting that this is a stronger case, inasmuch as here there is a deviation from the terms of the power, not only because the same condition is here annexed which was annexed in that case, but, also, as the time for the re-entry is extended. It appears, upon inspection of the briefs in *Coxe v. Day*, that the bill was filed by the next in remainder after the lessor, for a declaration that the lease was not executed according to the leasing power in the settlement, and for an account, and that the defendant might be restrained from setting up a term of five hundred years to defeat the plaintiff's claim at law. On the hearing, the Master of the Rolls directed a case to be stated for the opinion of the Court of *King's Bench*; and so satisfied were the defendant's counsel with the decision of that Court, that when the cause came on again to be heard on the equity reserved, they gave it up, and the cause was compromised by the tenant paying a larger rent. An argument has been urged of the supposed inconvenience of adopting the plaintiff's construction of the power, arising from the circumstance which may result from construing the power to require an unqualified power of re-entry in the lease. It has also been said, that many leases contain powers of re-entry similar to that in the defendant's lease. This argument is not applicable except in the case of leases made under powers, containing a similar restriction to that contained in the deed of 1757, and in no case is it of much weight. To find that in any particular district of *England*, there is not only a custom

1819.  
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 DOR  
 d. JERSEY  
 v.  
 SMITH.




1819.  
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 DOE
 d. JERSEY
 v.
 SMITH.

of leasing with such a clause of re-entry, but also a custom for great landholders to insert in their marriage settlements a leasing power restricted similarly to the present case, must be an extremely rare coincidence. The argument urged under the last head, from the supposed hazard to which the tenant would be exposed, should the defendant's construction be adopted by the Court, is fully counterbalanced by the utility of avoiding the uncertainty, which would be introduced into an important point of law by overruling the decision in the case of *Coxe v. Day*, in which all the judges of the Court of *King's Bench* concurred, and which has since been recognised as law in *Doe d. Vaughan v. Meyler (a)*. The lease in question, therefore, is invalid, not being conformable to the power contained in the settlement; it is therefore of no effect as against the remainder-man, and the lessor of the plaintiff is entitled to recover.

February 9th, 1819.—Mr. *F. Moysey*, for the defendant.—The lease in question contains two clauses, the first more special and express, and the last a sweeping or general clause. As to the first, the expression “*for non-payment of rent*,” contained in the leasing power, refers not so much to the time of the rent falling in arrear, as to the cause or ground of something to be done, or upon which the right of re-entry was to be secured; whereas, if the words had been “*on non-payment of rent*,” they would rather have had a reference to the time of some event happening; and Lord *Ellenborough* was of that opinion, and put that construction on them. Again, the term “*a clause of re-entry*,” in case the rent be behind twenty-

(a) 2 *Maule and Sel.* 276.

eight days after the time appointed for payment thereof," contained in the leasing power, as to leases at rack-rent, imports something more definite in form, which the donor of the power intended distinctly to mark out, as applicable to leases for short terms of years at rack-rent; whereas the expression, as applied to leases at a nominal rent, is general, and implies a latitude and reasonable discretion according to the subject matter. It is clear, that the general or sweeping clause at the end of the lease, where there is a reservation of rent and a covenant to pay it, embraces that subject, and would include the non-payment of rent, in case there were no previous special clause upon the same subject; but it is argued that this latter is a repugnant clause to an antecedent express stipulation for a power of re-entry on non-payment of rent, on the application of the general maxim, *Generalis clausula non porrigitur ad ea que antea specialitèr sunt comprehensa*. This, however, is applied on the ground that there is, on the subject of non-payment of rent, already an express and special clause of re-entry, without which the general clause would necessarily apply; if it were not so, the ground of repugnancy is beside the question; if there be not a special stipulation embracing the subject matter, there is nothing to prevent the application of the general clause; and the special clause applies distinctly, and gives a power of re-entry on non-payment of rent. The words of the power are qualified; there is a power of re-entry required and provided. The words of the power, then, being *primâ facie* complied with, it must be shewn, on behalf of the plaintiff, that such is not a compliance with the meaning. A power of re-entry is not the less so because it is qualified. It cannot be said, that because the power to lease is not given to the tenant for life, till he comes into possession or receives

1819.

 DOE
 d. JERSEY
 v.
 SMITH.

1819.

 DOE
 d. JERSEY
 v.
 SMITH.

the rents and profits, and not even then, if there be three lives existing on the property, that this qualification destroys the leasing power altogether. This qualified right of re-entry under the first clause gives to the remainder-man all the benefit intended by the creator of the power, and all that is required by the general words and intention on his behalf. For the plaintiff it has been insisted, that a general power of re-entry for non-payment of rent has no limited meaning, and that according to legal acceptance it means an unqualified and immediate right of entry; and to prove that, *Littleton* (a) has been cited; but he there merely professes to give general examples of an absolute condition of re-entry expressed in a deed, and not two remote instances distinct from each other. But it appears from *Littleton* (b), that the distinctions taken by Lord Coke, and Mr. Baron Comyn (c), between an absolute or general, and a qualified, conditional, or special right of re-entry, altogether differ from, and have nothing to do with, the present question. The well known clear distinction between a general and a special condition is, that in the one the lessor shall re-enter, and in the other, that he shall enter and hold until payment or satisfaction. It is laid down as a well known rule for the construction of powers in *Sheppard's Touchstone* (d), that the construction be reasonable, and according to an indifferent and equal understanding. That too much regard be not had to the native and proper definition, signification, and acceptance of words and sentences, to pervert the simple intention of the parties: So in *Hill v. Grange* (e), the Court said, "it is the office of Judges to take and expound words, which common

(a) Sec. 325.—(b) Sec. 327.—(c) *Com. Dig. Til. Condition*, G. 3.—(d) *Page* 86.—(e) *Plowden*, 170.

people use to express their meaning, according to their meaning:”—common usage and popular understanding are, therefore, the principles of construction. If it could be shewn, that the special clause of re-entry, introduced in the first part of the lease, were unheard of, extravagant, or perverse, the meaning of the leasing power would not be complied with, whereas it is a clause in common and popular use, and therefore within the meaning of the power. If the leasing power had required that the lease should not contain a power of re-entry, for non-payment of rent, and with that prohibition the present clause of re-entry had been inserted, it would have been a breach of the condition and an infringement of the prohibition. The only difference between a prohibition and requisition is this, that in the one, if the reasonable and ordinary meaning be broken through, it would not be an answer for the defendant, to shew that the clause was extravagant or absurd; but in the other, a performance, if absurd and perverse, would not be sufficient, although within the reasonable meaning and construction of the words. The defendant merely contends for a reasonable construction of the power, expressed as it is in general terms, and which is not touched by any unreasonable or extravagant cases which may be suggested on the part of the plaintiff. If the owner of this property were to persuade a tenant to accept such a lease as the present, under an assurance that it contained no clause of re-entry for non-payment of rent, would he not be guilty of a gross fraud, according to common apprehension and use of terms? The defendant is not bound to contend, that this is the only clause that could be a compliance with the power; because it is sufficient for him, that the words being general, he is within their fair and ordinary interpretation, as the law will expound

1819.

 DOE
 d. JERSEY
 v.
 SMITH.

1819.
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 Doe  
 d. JERSEY  
 v.  
 SMITH.

them. *Cotter v. Merrick* (a). The cases of *Kemp v. Kemp* (b), and *Butcher v. Butcher* (c), do not assist the argument for the plaintiff, inasmuch as it is the plaintiff himself who would limit the latitude of the general expression, and confine it to a peremptory clause of re-entry. In *Butcher v. Butcher*, the question was, whether an appointment of £200 stock, though an unequal proportion of the fund, was or was not illusory. In that case, the Master of the Rolls said, "It is impossible to have considered a case of this kind, without wishing that Judges in equity had either never assumed control over the execution of discretionary powers, or had laid down rules, by which their successors might be guided." The plaintiff, here, wishes the Court to assume control over the discretion which the general words allow to the defendant. "To say," continued his Honour, "that under such a power an illusory share must not be given, or, that a substantial share must be given, is rather to raise a question than establish a rule." So here, to say that under such general words as these, a qualified power of re-entry must not be given, is only to raise a question, not to establish a rule. "Whence," asked the Master of the Rolls, "is the intention to be collected? Not from the words, for they are purely discretionary. But a conjecture is made that the party creating the power would not have approved of extreme inequality." Here, the plaintiff conjectures, that a party using these words would not have allowed any indulgence. "The party might have prescribed any limits he thought proper." So here, the party might have prescribed any form of re-entry he thought proper; "a latitude might have been given quite suf-

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(a) *Hardres*, 89. — (b) 5 *Vesey*, Jun. 849. — (c) 9 *Vesey*, Jun. 893.

ficient for the purpose of creating the dependence, which is frequently intended, and yet boundaries might have been prescribed :” “ If that is not done, it is either because the party had no wish to fix any limits, or because he was unable satisfactorily to himself to fix upon the limits which under all the circumstances might be proper.” “ Upon either supposition,” the Master of the Rolls said, “ why should this Court attempt to do what the party in the exercise of his own judgment, relative to his own acts, has abstained from.” So why should the Court, in this case, attempt to limit these general words to one immediate, peremptory, and unsparing clause of re-entry, when the party exercising his own judgment, by various directions as to the management of the property, has directed no such clause? “ Why is this Court to say there is a limit not to be transgressed, under the penalty of making the whole void,” by an arbitrary rule having no principle to rest on, having no foundation in the intention of the party, disclosed, or apparently presumed?” Let the plaintiff answer the question, as he is contending for a principle precisely the same as the one alluded to. The observations of Lord *Ellenborough* in the judgment of the Court of *King’s Bench*, in this case, coincide with this view of the question. His Lordship there said (this judgment is not yet in print, and the following extract was read by the learned counsel from the short-hand writer’s notes), “ the power is silent as to the time when it should be carried into effect, and being so silent, why should it not, in virtue of such silence, be intended that the creator of the power thought it enough to require, that there should be some reasonable power of re-entry for non-payment of rent upon every lease; leaving it to the discretion of the person, by whom it should be granted, to prescribe when, and under what

1819.  
  
 DOE  
 d. JERSEY  
 v.  
 SMITH.

1819.  
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 DOE
 d. JERSEY
 v.
 SMITH.

circumstances, that power of re-entry should in each particular case be enforced: by requiring that the leases should always contain a power of re-entry, he calls the attention of the successive lessors from time to time to the subject, whenever the occasion of leasing should recur; and when the attention of the lessor is called to it, it is hardly likely, that he should, in the exercise of a proper discretion, introduce into his lease so harsh and rigorous a provision." The cases of *Wright v. Wakeford*, *Doe d. Mansfield v. Peach*, *Wright v. Barlow*, and *Hawkins v. Kemp* have been cited for the plaintiff, to shew that where some specific mode or form, or other precise circumstance, is required, it must be punctually performed: in such cases, form in fact is substance; but the question here arises on the construction of general words. In *Orby v. Lord Mohun* (a), the power was to a tenant for life, in possession, to grant leases of all lands anciently demised, reserving the ancient and accustomed rents, and of the other lands, reserving the best and improved rents. According to the fair and common construction of that power it would require distinct leases, reserving distinct rents, and the remainderman was placed under incalculable difficulties by the mode of leasing there adopted, which was a general lease, and which the Court held to be rather a delegation than an execution of the leasing power. In all the cases, from that of *Huntington v. Lord Mountjoy* (b) to the present time, where leases have been set aside as being not conformable to the power, there has been either a palpable trick or fraud, or a departure from some prescribed form, mode, or circumstance, or from the ancient and accustomed course expressed or implied; or if on an

(a) 2 *Vernon*, 531, 542. *S. C.* better reported, 3 *Chan. Rep.* 56.—(b) *Mugge*, 174. *S. C.* 4 *Leon*. 147. *S. C.* *Godb.* 17.

omission, it is such as in the present, where the Court could not say whether such course was required or not. In such a case, where a tenant for life has made an innovation, it may have been required of him to shew that he had not thereby placed the remainder-man under greater disadvantages than in former times; but the lease in question cannot be impugned on any of the above grounds. It must be admitted that where any thing precise is required by a power, it must be done as in *Darlington v. Pulteney* (a), where the power required an execution by deed, and therefore the execution of a will was held not to be a compliance with the power. Mr. *Kenyon* there said, and Lord *Mansfield* afterwards adopted his argument, that powers are of three kinds; *first*, naked powers, unaccompanied with any interest, the construction of which has been very rigid; *secondly*, powers granted to the donee of a particular estate, which were formerly construed strictly in favour of the remainder-man, but no further, and of late taken more liberally; *thirdly*, powers reserved by the donor to himself, which have always been taken largely. Of this latter class is the present power. Lord *Mansfield* there also said, "That Courts of law originally compared powers to conditions which they are not at all like, and consequently held that they should be construed strictly, whereas in fact they are only a different species of ownership and enjoyment of property." His Lordship's observations are to the same effect in *Woolsson d. Zouch v. Woolston* (b), where the powers were to tenants for life; and the *Solicitor General*, in *Hearle v. Greenbank* (c), said, "That in the modification of estates, Courts of law hold, where powers are coupled with an interest, they may be released or extinguished, and when they flow

1819.
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 DOB
 d. JERSEY
 v.
 SMITH.

(a) *Cowper*, 263.—(b) 2 *Burr.* 1136.—(c) 3 *Atkyns*, 703.

1819.
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 DOR  
 d. JERSEY  
 v.  
 SMITH.

from an interest they may be considered as modes of ownership; and that with this view Courts construe them liberally as parts of the old ownership belonging to the grantor of the estate." In *Orby v. Lord Mohun (a)*, it was said, "that the intent was to give a power of leasing in a reasonable manner, as leases fell in, and for keeping the estate tenanted, as the owner of an estate would be supposed to do." Here it is admitted, by the plaintiff, that the intention of the creator of the power is to govern; but it is argued that such intention is always to benefit the remainder-man rather than the tenant for life. But in *Goodtitle d. Clarges v. Funucan Lord Mansfield said (b)*, "There is no ground or reason of equity or policy, between the tenant for life, and the remainder-man, for leaning to either side." Although Chief Justice *De Grey* in *Campbell v. Leach (c)*, said, "If executing this power is for the benefit of the remainder-man, it should receive a liberal construction; but if a tenant for life invades the interest of the remainder-man, in order to benefit his own only, it should have another construction," it is not applicable to this case; for there is no ground to say that the tenant for life here invaded the interest of the remainder-man to benefit his own. The general object of an owner of property in creating a leasing power is the good management and benefit of the estate, which is completely for the benefit of the remainder-man. Had not the tenant for life the power of granting a permanent interest, and continuing beyond his time, no capital would be invested in extended improvements of the property, and the estate would descend to the remainder-man, perhaps, barely in repair; for the tenant of a precarious interest can feel no attachment to the land. It is the permanency and security of the interest,

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(a) 2 Vern. 534.—(b) 2 Doug. 573.—(c) Ambler, 748.

by renewal, which will descend to his children, that urges as well as justifies a tenant in making agricultural improvements, and by diminishing this security, his liberality of spirit is crushed. This is the true and well known interest and advantage of the remainder-man. To construe the power otherwise, would be to put a particular construction on general words, in violation of the general object for which such power was created. It would be far more difficult to let the estate to a respectable and opulent tenant, with a peremptory clause of re-entry, than with such a modified clause as is now contended for by the defendant. No man would risk the loss of his property, because he might happen to omit the payment of a nominal rent on the very day on which it became due. Could the creator of the power have considered this rigorous clause as the indispensable condition of a lease, although the distrainable property on the premises were ever so large? Can it be difficult to ascertain, whether there be a sufficient distress for a guinea on the premises, while there is cattle on the hills or furniture in the house? If all the premises be apparently vacant and deserted, an ejectment may be served; and this, notwithstanding the possibility of some distrainable goods being still on the premises; for it is laid down in *Comyn's Digest* (a), that, "If a condition be to re-enter if no distress be found, this shall be expounded of a *reasonable* distress, and therefore if a locked cupboard remains there, he may enter." The same construction applies to a reasonable power of re-entry. A qualified clause of re-entry, similar to the present, appears to have been in use in the time of Queen *Elizabeth*, and may be found in *Grygg v. Moyes* (b), and also in *Wood v. Germans* (c). As to the possible difficulty arising from the want of sufficient

1819.  
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 DOE
 d. JERSEY
 v.
 SMITH.

(a) *Tit. Condition, T.*—(b) *Cro. Eliz.* 764.—(c) *Cro. Jac.* 390.

1819.
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 DOE
 d. JERSEY
 v.
 SMITH.

sureties, that argument is derived from the case of *Case v. Day*; but that was the case of a lease at rack-rent, whereas, here the rent is only a guinea; the subject matter is therefore wholly different. But the authority of *Case v. Day* is directly opposite to that of *Holley v. Scott (a)*; still the authority of the former case is not to be impugned, as the subject matter is altogether different. That was a lease for twenty-one years at rack-rent, and a specific clause of re-entry was directed, so that it merely resembles the second clause of the power here, as regards the rack-rents; but in this case it is a lease for lives, the rent is merely nominal, and the words of the power are general and undefined. In a case of rack-rent, the same indulgence should not be shewn; the landlord does not speculate upon improvements on the estate. The rent is every thing, and a peremptory power may be more beneficial to the remainder-man; but in the case of nominal rents, there is no real probability that the tenant will refuse to pay his rent. It has been further objected that the tenant for life may die between the day on which the rent reserved becomes payable, and the period allowed him before re-entry; but in this case his executors will be entitled to the rent, and the remainder-man can have no benefit of the condition for non-payment of rent, which never became due in his time. As to the chances of forfeiture, of which the remainder-man is deprived, and for which *Holmes v. Coghill (b)* has been cited, that case does not apply to the present: it is not contended that the power is not to be executed in the manner directed, as far as it is so directed, but that, as the power is left in general words, they are to be interpreted according to the probable intention of the creator of the power. The practice of relieving a

(a) *Lofft*, 316.—(b) 7 *Ves. Jun.* 499.

tenant from an ejectment brought on a clause of re-entry for non-payment of rent, on bringing the money into Court, and paying the costs, was established before the 4 G. 2. c. 28. *Smith v. Parks* (a), *Phillips v. Doelittle* (b). Suppose, therefore, the landlord to have the common law re-entry, and to proceed in ejectment; the Court will relieve the tenant as before, on payment of costs, and the whole proceeding will be nugatory, as to the recovery of the land. With respect to the leasing power, there is a marked and very wide distinction between the two powers of leasing for rack, and at nominal rents. In the one, a precise form is given; in the other, there is only a general requisition, which is sufficiently complied with by the clause before the Court. It could never have been intended, by the creator of the power, that the tenants should be harassed about a mere nominal rent. No person would venture to put into a lease, this disadvantageous clause without express directions so to do, but would refer to the old leases. The same leasing power is given to Lady *Vernon* as to her husband, and the same restriction will apply in either case. The power is to lease lands then leased for lives in possession or reversion, her father being at that time dead. She did not intend to treat the old tenants in the rigorous manner now contended for. She directed the ancient and accustomed rents, duties, and services, or as great or beneficial rents, to be reserved. She, therefore, did not mean that they should be accompanied by any condition to make them objectionable to the tenants. She then excepted heriots, which might be varied at discretion; but if the general words of the power as to those, necessarily mark a discretion, there was no occasion for her to express it farther. But it is said

1819.
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 Doe  
 d. JERSEY  
 v.  
 SMITH.

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(a) 10 Mod. 333.—(b) 6 Mod. 345.

1819.  
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DOE  
d. JERSEY  
v.  
SMITH.

that Lady *Vernon* intended to make an alteration in the old clause of re-entry. Then why did she not express it as she did, where she deviated, as to heriots, from the old and accustomed course? It must be taken by the power, either that Lady *Vernon* left the matter generally and indefinitely, and by her general expressions left a discretion to insert any reasonable clause of re-entry with reference to the subject-matter, or, as she directed no variation, and required the ancient and accustomed rents only to be reserved, it may fairly be presumed, that she intended also the ancient and accustomed clause of re-entry to accompany them. Independently of the construction of the power, the finding of the jury must now be resorted to. If the construction imports that there is to be a reasonable power of re-entry, what can be so reasonable as that which was always usual and accustomed? If the accustomed clause was intended, such clause must be proved to be that used by a reference to the former leases. The evidence of these leases was admissible to shew what was usual, though they might not be received to shew what was reasonable. It was so offered, and so received, not to shew the construction of reasonableness, and therefore the cases of *Iggulden v. May*, *Cooke v. Booth*, and others, which go to prove that the construction of a deed is not to be gathered from the acts of the parties, have no application. As to the sweeping or general clause at the end of the lease, it has clearly words sufficient to embrace the non-payment of rent; but it is said that the latter clause can have no operation, as being repugnant to the first or special one. But in *Sheppard's Touchstone* (a) it is laid down as a rule, that if there be two clauses of a deed repugnant to each

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(a) Page 88.

other, the first shall be received and the last rejected, except there be some special reason to the contrary. What more special reason to the contrary can there be, than that *res magis valeat quam pereat*? The maxim, *generalis clausula non porrigitur ad ea quæ antea sunt comprehensa*, does not apply to this part of the case, as it presupposes the existence of a valid and operative special clause providing for the subject-matter; whereas, it is contended in this case by the plaintiff, that the first clause is null and void, and that the remainder-man is not bound by it in the slightest degree; if so, it can have no operation to exclude the second clause. So here, the maxim "*Expressum facit cessare tacitum*" does not apply. Where a contract is valid and available in law it may do so, but where an express contract is unavailable between the parties, as for want of compliance with the stamp laws, an implied contract may be resorted to, and the party may recover on a *quantum meruit*. *Tyte v. Jones (a)*. Should the remainder-man enter under the general clause for non-payment of rent, the tenant, by setting up the first clause as repugnant to it, would, according to the plaintiff, vacate his lease. If so, to avoid that evil he must necessarily submit to the general clause; because then he may save his possession by bringing his rent into Court, and staying the ejectment. It is said that the plaintiff has not the common law right of re-entry, but must proceed under the statute 4 Geo. 2. c. 28.; but if the special clause applies to the mode of proceeding under that statute, the general clause, which contains no qualification, must apply to that at common law, and the Court will give effect to both clauses, by construing the one with reference to the statute, and the other as connected with the common law, and thus the whole of the

1819.  
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 Doe
 J. JERSEY
 v.
 SMITH.

(a) 1 East, 58. n.

1819.
 Doe
 d. JERSEY
 v.
 SMITH.

deed, and every part of it, will have the greatest possible effect given to it (a). So Lord Mansfield in *Pugh v. the Duke of Leeds* (b), in deciding on the word *from* in the lease, said, that "It should be so construed as to make it conformable to the power, and that the parties to a lease, under a power as that was, necessarily understood it in that sense which made the deed effectual." The inconsistency in this case between the general and special clauses is not greater than in *Roe d. Goatly v. Payne* (c), between a covenant to repair generally, during the term, and afterwards a special covenant to repair within three months after notice. The landlord there re-entered after notice, and before the expiration of three months, and it was held good. The meaning of a sweeping clause generally is, that if any particular matter be omitted, or not effectually provided for, such clause may take up the subject and remedy the omission. But it will not be necessary in this case to decide on the latter clause, the former being a full compliance with the power. The question must be decided on general views of the subject, on the intention of an owner of an estate consulting the probable and solid advantages of the property, as well as the fair and liberal treatment of the tenant. For these reasons, the lease is clearly a perfect compliance with the power, and the defendant is entitled to judgment.

Mr. Jervis, in reply.—The argument for the plaintiff rests on two points; *first*, that the leasing power required an absolute power of re-entry in the lease, unlimited, absolute, and general as to time, and unclogged with any condition; and, *secondly*, that the lease in question gave

(a) *Sheppard's Touchstone*, page 87.—(b) *Comp.* 725.
 —(c) 2 *Campb.* 520.

no absolute power of re-entry. One or other of these propositions the defendant must satisfactorily deny: he has placed his main reliance on the denial of the first, and adverted but slightly to the last. The leasing power is *first* construed by the defendant as not requiring an absolute power of re-entry; and, *secondly*, it is contended that the lease does contain such absolute power re-entry, which is to be found in the second branch of the proviso for re-entry. There are certainly two powers of re-entry in that proviso; the first conditional, being a right of re-entry in the event of the rent being in arrear fifteen days, and no sufficient distress upon the premises,—whereas the leasing power required an absolute right: there is also a general power of re-entry in the subsequent part of the same proviso, in default of the performance of any of the covenants in the lease. On adverting to the former part of the lease, it is true that there is a covenant on the part of the tenant for the payment of rent at certain days;—and it has been contended for the defendant, that had it not been for the former part of the proviso, the latter alone would have satisfied the leasing power, because it would have applied to the covenant for payment of rent, and authorized a re-entry on non-payment of rent on the day. It has also been farther contended, that as to the last of these provisos, the landlord may demand the rent on the day on which it became payable, with the formalities of the common law; and that if it be not paid on the last moment of the day, he has a right to bring an ejectment, notwithstanding the fifteen days are not expired, and notwithstanding there is a sufficiency of distress on the premises. And in order to give effect to the first, it is said that in case the landlord may have omitted to make his demand on the day, so as to entitle him to an ejectment at the common law,

1819.
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 Doe  
 d. JERSEY  
 v.  
 SMITH.




1819.  
 DOR  
 d. JERSEY  
 v.  
 SMITH.

founded on such demand, yet he may have recourse to the former proviso for re-entry, and he may then, at the expiration of fifteen days, if there be no sufficient distress upon the premises, maintain his ejectment upon that part of the proviso. It is true he might do that, even if the former part of the proviso had not existed, because he might bring his ejectment before the fifteen days had expired by the 4 Geo. 2. c. 28. (a). The case of *Roe d. Goatly v. Paine* (b) is an express authority against the defendant; for, by considering the principles by which written instruments are to be construed, and which are applicable to this case, it will be found the most general rule is, that the intention of the parties, to be gathered from the words of the instrument itself, is to prevail: all other rules are subsidiary to that. Another rule is, that if there be two inconsistent clauses in a deed, the first is to prevail, and the last to be rejected; this is rather a rule of convenience and of necessity than a rule founded on any substantial reasoning. The next rule is that laid down in *Altham's case* (c), "*Generalis clausula non porrigitur ad ea quæ antea specialitèr sunt comprehensa.*" This rule is applicable generally, and may so apply to this; and Lord Coke said, "If the general words should stand without any qualification, then the special words would be altogether vain and of no effect;" and again, "where a deed speaks by general words, and afterwards descends to special words, if the special words agree to the general words, the deed shall be intended according to the special words." The reason on which this rule is founded is, that in using general words the attention is not necessarily drawn to every individual meaning they comprehend; but in using special words the

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(a) 4 G. 2. c. 28. s. 2.—(b) 2 Campb. 520.—(c) 8 Rep. 154. b.

particular subject to which they apply must be contemplated. In *Butler v. Duncomb* (a), another rule was laid down by Lord Chancellor *Parker*, who there said, "Surely it is a rule both in law and equity, so to construe the whole deed or will, as that every clause should have its effect." If the Court by any possibility can construe the subsequent part of this latter clause, as containing a power of re-entry, it will nullify and give no effect to the preceding clause. The reason of that rule is, that it was improbable that any part of a deed was intended by the parties to be wholly inoperative. All those rules, therefore, shew that the defendant's construction of this lease is altogether inconsistent. Is it likely that a lessor, intending to secure to himself an absolute power of re-entry for non-payment of rent, in addition to the conditional power of re-entry thereinbefore contained, should attempt to express this by a clause, in which the word *rent* does not at all occur? The word "reservations" might be sufficient to include rent, but it equally applies to many other things besides rent, such as services, and the like. The principle on which the decision in *Roe d. Goatly v. Paine* proceeded, was the necessity of giving effect to distinct and independent clauses; and in that case the proviso for re-entry could have no effect at all, unless it were held, that the party had a right to recover on that clause. Lord *Ellenborough* there said, "The indenture contains a general covenant to keep the premises in repair. By breach of this, the lease was forfeited, and the notice was no waiver of the forfeiture." These then were two distinct and independent covenants, and the only thing to be looked to, was the in-

1819.  
  
 DOE  
 d. JERSEY  
 v.  
 SMITH.

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(a) 1 *Peere Wms.* 457.

1819.  
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 Doe
 d. JERSEY
 v.
 SMITH.

tention of the parties so as to give effect to both.— If Lord *Ellenborough* had not given effect to the first clause, it would have been rendered of no effect at all: for it would have been restricted by the subsequent covenant, and the landlord must have waited three months, before he brought his ejectment. So here, the lessor would have been unable to do any thing under the special, if the general clause were permitted to prevail. In order to maintain that this part of the proviso, “or if any default shall be by them the said *Charles Smith* and *Henry Smith*, their executors,” &c., was consistent with the former part of the power, the fifth rule in *Sheppard’s Touchstone* (a) was mainly relied on when this case was argued in the Court of *King’s Bench*, viz.—“That the construction be such as the whole deed and every part of it may take effect, and as much effect as may be to that purpose for which it is made, so as when the deed cannot take effect according to the letter, it be construed so as it may take some effect or other. *Verba debent intelligi cum effectu. Et benignè faciendæ sunt interpretationes, ut res magis valeat quam pereat.*” But Mr. Justice *Bayley* observed, that it was there added, by the sixth rule, “that (b) all the words of the deed in construction be taken most strongly against him that doth speak them, and most in advantage of the other party, *verba chartarum fortius accipiuntur contra proferentem, et quælibet concessio fortissimè contra donatorem interpretanda est.*” That applies strongly to the present case; for here is a concession made to the tenant. A rule is laid down in *Bacon’s Abridgment* (c), that “Grants are to be construed according to the intention of the parties, and if there appears any doubt or repugnancy in the words,

(a) *Page 87.*—(b) *Ibid.*—(c) *Bac. Abr. tit. Grant. 1.*

such construction is to be made as is most strong against the grantor." That rule is applicable to the lessor here, because he is presumed to have received a valuable consideration for what he parted with. As to the rule (a), "that if there be two clauses or parts of a deed repugnant the one to the other, the first part shall be received, and the latter rejected, except there be some special reason to the contrary," the reason must appear upon the face of the instrument itself. The case of *Pugh v. The Duke of Leeds* (b) has been cited for the defendant, where in consequence of the rule *ut res magis valeat quam pereat*, the Court held that the word "from" may, in the vulgar sense, and even in the strictest propriety of language, mean either inclusive or exclusive; but that decision has caused great dissatisfaction. *Roe d. Goatly v. Paine*, only decided, that a lease might contain a general proviso of re-entry on a breach of covenant to repair, and also, a distinct covenant to repair after three months' notice. In *Horsfall v. Testar* (c), the question was, whether the words omitted were part of the covenant, and that case was decided on a variance. The cases of *Hope v. Stephenson* (d), and *Wood v. Day* (e), merely shew that covenants apparently inconsistent may stand to give the whole deed effect. In *Duppa v. Mayo* (f) it is said, "where there is a condition of re-entry reserved for non-payment of rent, several things are required by the common law to be previously done by the reversioner, to entitle him to re-enter; *first*, there must be a demand of the rent; *secondly*, the demand must be of the precise rent due, for if he demands a penny more or less it will be ill; *thirdly*,

1819.
 DOR
 d. JERSEY
 v.
 SMITH.

(a) *Sheppard's Touchst.* 83.—(b) *Cowper*, 714.—
 (c) 1 *Moore*, 19. S. C. 7 *Taunt.* 385.—(d) 3 *Bos. and*
Pul. 565.—(e) 1 *Moore*, 389. S. C. 7 *Taunt.* 646.—
 (f) 1 *Wms. Saund.* 287. n. 16.

1819.
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 DOE
 d. JERSEY
 v.
 SMITH.

it must be made precisely upon the day when the rent is due and payable by the lease to save the forfeiture, as where the proviso is, "that if the rent shall be behind and unpaid by the space of thirty or any other number of days after the days of payment, it shall be lawful for the lessor to re-enter, "a demand must be made on the thirtieth or other *last day (a)*," not on the day when the rent is reserved, because this is an extension of the time, not for the payment of the money, but to prevent a forfeiture. If, therefore, the proceeding in the present case is at common law, it must be founded upon the former part of the proviso, which gives a conditional right of re-entry, and the demand must be made on the fifteenth day, otherwise no effect at all would be given to that part of the proviso; because, if the demand is made on the *first* day, it is inconsistent, because the tenant is told he has fifteen days: he is deluded and deceived into a forfeiture, if there can be a forfeiture under the second clause. These clauses may therefore well stand together; but if they cannot, and the word *reservations* should be construed to mean *rent*, then the last clause will be rejected, and the first will be the only clause on which re-entry can be sustained. There are many leases where there is a conditional power of re-entry, and a general power of re-entry at the last; but an ejectment has never been brought on the latter. It has been contended for the defendant, that no inconvenience existed here, and that no additional proof would be required; but in *Bees v. King (b)*, the party failed in his ejectment, because he had not proved, that he had searched every part of the premises for a distress. The case cited from *Comyn's Digest* has no application to this point, because in that case there was a search, and there was, in a

(a) *Co. Litt.* 202. a.—(b) *Forrest.* 19.

locked up cupboard, property sufficient to cover the distress. *Core v. Day* is not to be distinguished from the present case, while that of *Jones d. Cooper v. Verney (a)* is wholly so. The question there was upon a power of granting building leases with proviso of re-entry: the lease was merely a lease of an old house with covenant to repair, and a proviso of re-entry for non-payment of the rent for forty-two days: and that case was decided on the point that it was not a building lease. In *Thompson v. Lady Lawley (b)*, Lord Chief Justice *Eldon*, speaking of the rule laid down in *Rose v. Bartlett*, said, "I think it better to over-rule it altogether, which I must not do, than to deny to it its effect upon grounds which do not completely satisfy my mind as solid and safe grounds of distinction." If the judgment of the Court of *King's Bench* be not received in this case, that in *Core v. Day*, recognized in *Doe d. Vaughan v. Meyler (c)*, cannot be law, and must consequently be over-ruled.

1819.
DOE
d. JERSEY
v.
SMITH.

Cur Adv. Vult.

May 22d, 1819.—On this day the Judges being divided in opinion, delivered their judgments *seriatim*, as follows:—*

Mr. Baron GARROW.—This case is brought before the Court on a writ of error, to reverse the judgment pronounced by the Court of *King's Bench*; and the question arises in consequence of a deed of settlement of the 2d day of *July*, in the year 1757, made upon the marriage of Mr.

(a) *Willes*, 169.—(b) 2 *Bos. and Pul.* 318.—(c) 2 *Maule and Sel.* 276.

* Mr. Justice *Richardson* having been originally engaged as counsel in the cause, abstained from expressing his sentiments.

1819.
DOE
d. JERSEY
v.
SMITH.

Vernon, afterwards Lord *Vernon*, with Lady *Louisa Barbara Mansel*, and upon a power of leasing, which was granted by that settlement. The question is, whether a lease, which was afterwards granted by Lord *Vernon*, whilst he was in possession of the estate, and entitled to it for his life, to the defendant Mr. *Smith*, and another who is since dead, for their lives, is a good execution of the leasing power, or whether it is not in conformity to it: for if not in conformity to it, then the lease is void, and this judgment ought to be reversed; but if it is a good execution of the leasing power, then the judgment pronounced by the Court of *King's Bench* ought to be affirmed. The settlement under which this question arises provides for several estates, which were to pass, according to the limitations of the settlement, to those who should be entitled to them for life in succession; and it provides for different sorts of estates; for estates, which had been formerly let upon leases for years absolute, and estates which were let for long terms of years, determinable upon lives; and it respects other property entirely out of the present question, *namely* the mining property belonging to this family; and it is observable, that, with respect to the leasing power, and the restrictions to be contained in leases to be executed under the power, the terms are different, as applicable to the two species of property to which I have referred. Where there is a lease granted for a term of years absolute, whereon there is a rent reserved, which must be supposed to be equivalent to the value of the estate in the hands of the tenant, it is required, that all such leases shall contain a power to re-enter, in case the rent reserved shall be in arrear for the space of eight-and-twenty days after it shall become due. With respect to the property, whereof the land sought to be recovered by the present ejectment is a part, and which had been

formerly demised for long terms of years determinable upon lives, it is provided, that in order to make it a good lease under the terms of the power, there shall be contained in the lease a power of re-entry for non-payment of rent: but in this leasing power no time is specified, either by way of indulgence to the tenant as to the payment of it, nor are any other terms required by the person, who from time to time shall be in possession of the estate, than that he shall insert in it a power to resume the possession of the estate for non-payment of rent. It has been strongly insisted before the Court, that we are to understand the object of the creator of the power to have been, to take care of the interest of the reversioner. I agree to that argument, that it is one of the objects of the grantor to take care of the interest of the reversioner; but, in the mean time, it is equally his object to take care of the interest of the tenant for life, and to make the estate in the hands of the tenants, whoever they should be, a beneficial estate; and to impose such terms as to the manner, in which it was to be holden under those, who from time to time should have power to grant it, as would be most beneficial, and if beneficial to the tenant for life, would be equally beneficial to the reversioner, and so, converting the terms, if beneficial to the reversioner, it will in the mean time be beneficial to the tenant for life. The lease granted by Lord *Vernon* to the defendant and his deceased relation contains a clause not for re-entry, if the rent shall be in arrear twenty-eight days, but if the rent shall be unpaid for the term of fifteen days, and if there shall be no sufficient distress upon the premises to satisfy that rent; and the question is, whether this is a good execution of the power, or in other words, whether this is such a power of re-entry as was required by the creator of the settlement? It is observable that the creator of the power, as the expression is in a Court

1819.
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 DOE  
 d. JERSEY  
 v.  
 SMITH.



1819.  
DOE  
d. JERSEY  
v.  
SMITH.

of Justice, or according to the real fact, the adviser of the creator of the power, knew how to make distinctions as to the power of re-entry; and in this case, where the rent reserved is of the most valuable description, there the creator of the power only requires of those, who shall come in succession into the possession of this estate as tenants for life, that they shall, for the preservation of this estate in its most beneficial form and extent, for those who shall be from time to time interested as reversioners, insert a provision, that if the valuable rent reserved on leases for years absolute shall not be paid for twenty-eight days, then there shall be a right to enter at the expiration of that time. In the case of the render of two pounds a year and a couple of fat capons, or eighteen-pence at the option of the lessor, it is now insisted that the power of re-entry should be altogether absolute and unconditional, and that at the first moment, when the day has expired on which the money is demandable, the power of re-entry is to attach, and enable the reversioner, at that moment, to turn the person out, who, upon a valuable lease for years determinable upon lives, should have permitted the clock to make its round, before he had paid his sum of two pounds. If the creator of the power had said it shall be a power to re-enter at the moment on which the rent is due and not paid or tendered, I admit the argument, which was strongly pressed upon the Court, that we cannot alter, but must execute it; and if the creator of the power had inserted that special condition, I should not have thought that we could depart from it, and make another power: we are to see, whether, in fact, the power has been complied with or not. Now the terms of the condition in the settlement are, that there shall be contained in the leases a power of re-entry on non-payment of rent. Is there not in the lease granted to the defendant a power

of re-entry on non-payment of rent? There is; but it is stated, and, I admit, with very considerable force (for I by no means undervalue the strength of the arguments against the opinion to which I have found myself bound to come, and I respect the opinions and the great authority of those whom I know to differ from me), that this is not such a compliance with the power as the reversioner has a right to expect that the lessor should have made; for he has clogged the clause of re-entry with a delay of fifteen days; he has clogged it, too, with the necessity of seeing that there is no sufficient distress upon the premises. The answer to that is (and we must look at this according to the experience which mankind have upon such subjects), that this event is not to be looked for in the common occurrences of life, and probably was not at all looked for by the creator of the settlement, that a rent of two pounds a year upon a valuable lease for life shall be either unpaid or not secured by a sufficient distress upon the premises, so as to make it an important condition against the interest of the reversioner, or against those entitled to the estate. Without, therefore, taking up more of the time of the Court, it appears to me, that this, being a clause of re-entry for the non-payment of rent giving to the person, to whom the rent is to be reserved, a power of re-entering, if fifteen days shall elapse without the payment, and if there shall be no means of satisfying him by distress upon the premises, is a satisfaction of the requisition, which requires only that there shall be a power of re-entry for the non-payment of rent. I, perhaps, should have done better if, concurring as I do in the judgment delivered by a great man, now no more (*a*), who delivered the opinion of the Court of King's

1819.  
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 DOE  
 d. JERSEY  
 v.  
 SMITH.

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(a) *The late Lord Chief Justice Mansfield.*

1819.  
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 DOE
 d. JENNEY
 v.
 SMITH.

Bench, I had read the judgment delivered by him on that occasion, but it might have appeared that I had not taken so much pains to make myself master of the case as I ought to have done. I have, probably, in delivering what I have said, weakened the effect of that, which fell from that high and great authority. My opinion is, that the judgment of the Court of *King's Bench* ought to be affirmed. I have as yet omitted the second question, whether certain leases were properly admitted in evidence: but if I am right in the opinion I have formed, that the leasing power has been complied with by there being a reasonable clause of re-entry, I think it follows, that the persons who, from time to time, were in possession of the estate, and were to make leases under the power, were well warranted and invited by the state of their property, to look at the antecedent leases which had been granted of similar property by those who had gone before them; and that, therefore, if they were at liberty to do so, it was properly submitted to the consideration of the Jury, whether the lease now in question were a good execution of the power in the settlement.

Mr. Justice BURROUGH.—The question in this case arises on a special verdict. We have to decide, whether a lease made by a tenant for life, under a settlement made in consideration of marriage, is valid or not. To render this lease valid, it must be shewn to be conformable to the power contained in this settlement. In order to give an intelligible opinion on this question, I find it necessary to state the words of the power as set out in the special verdict; because many observations arise on those words, which in my judgment, are decisive of the question. After the declarations of the uses of the settlement, the power is thus introduced: "Provided always, and it is hereby further declared and agreed by

and between the said parties to these presents, that it shall and may be lawful to and for the said *George Vernables Vernon* the younger, and *Louisa Barbara Mansel*, his intended wife, from time to time during their respective lives, when and as they shall respectively be in possession of, or entitled to the perception of the rents and profits of the manors, messuages, lands, tenements, and hereditaments, so limited to them for their respective lives as aforesaid, by indenture or indentures, under their respective hands and seals, attested by two or more credible witnesses, to demise, lease, or grant, such part or parts of the said manors, messuages, &c., or parts or shares thereof, whereof they shall be in possession, or entitled to the perception of the rents and profits as aforesaid, as now are leased for life or lives, or for years determinable on the dropping of a life or lives, to any person or persons in possession or reversion, for one, two, or three lives, or for any number of years determinable on the dropping of one, two, or three lives." Then follow the restrictive clauses; amongst which are the following: "So as, in every such lease for a life or lives, &c. there be reserved and made payable, during the continuance of the estates and interests thereby to be demised, the ancient and accustomed yearly rents, duties, &c., or more, or as great or beneficial rents, duties, &c. as now are, or, at the time of demising, were reserved;" and then follows the clause, on which the question in the case mainly depends: "And so as there be contained in every such lease a power of re-entry, for non-payment of the rent, thereby to be reserved." Then are added other restrictions, which need not be noticed. Immediately succeeding this, is another power, which it is necessary to advert to particularly. The former power relates only to lands then let for lives, or years determinable on lives.

1819.
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 DOE  
 d. JERSEY  
 v.  
 SMITH.

1819.  
  
 DOE  
 d. JERSEY  
 v.  
 SMITH.

The latter power runs thus: "And also, by indenture, &c. to demise all or any of the said manors, messuages, lands, tenements, and hereditaments, for any term or number of years absolute, not exceeding twenty-one years in possession, &c.; so as, upon every such lease, there be reserved as much, or as great and beneficial yearly and other rents as now are paid, or the best and most improved yearly rent, &c. without taking any fine," &c. To which is also affixed this farther restriction: "And so as, in every such lease for any term of years absolute respectively, there be contained a clause of re-entry, in case the rent or rents, thereupon to be reserved, be behind or unpaid, by the space of twenty-eight days after the time thereby respectively appointed for payment thereof." The special verdict then finds that Mr. *Vernon* was tenant for life, that the premises in question had been let for years, determinable on lives; and that he, on the 5th of *September*, 1803, made the lease in question, which is stated, and appears to contain a proviso, or *power of re-entry*, furnishing the principal question before us, which is in these words:—"If it shall happen that the rent of £2, and every or any of the duties, services, &c. shall be behind or unpaid, in part, or in all, by the space of fifteen days next over or after the times whereat or whereon the same ought to be paid, &c.; and no sufficient distress or distresses can or may be had and taken upon the said premises, whereby the same and all arrearages thereof (if any be) may be fully raised, levied, and paid;" then he may enter. The lease closes with this general clause, "That if any default shall be made in the payment or performance of all or any of the reservations, covenants, or agreements before contained, it shall be lawful for the lessor, his heirs, or assigns, to re-enter." The special verdict then finds the rents, duties, reservations,

and payments to be ancient and accustomed; that the lands and tenements in the lease and declaration mentioned are the same; and that the usual and accustomed form of leases of the estate contained in the said marriage settlement for lives, or for years determinable on lives, as well prior as subsequent to that settlement, was with a conditional proviso of re-entry similar to that in the said indenture of lease.—This is the substance of the special verdict. I have stated as much of it as appears to me sufficient to affect the point at present in dispute. The first question is, whether this finding of the Jury, as to the insertion of the conditional proviso of re-entry in prior and subsequent leases, can be made use of in construing the power contained in this settlement? I am of opinion, that it cannot. Many parts of these powers refer to a pre-existing state of the property; for instance, the first power authorises leases of lands then let, and requires the reservation of ancient and accustomed rents, &c. The second power requires the reservation of as great and beneficial rents, &c. as were then paid, or the best improved rent. I mention these matters for the purpose of contrasting them with the clause, on which the question immediately arises. There are cases wherein evidence of former leases and parol evidence must of necessity be received; because the parties to the deed refer to matters of fact, and make them part of the transaction; and the matters found by the jury would be fit for our consideration, if there were a word in the clause in question, which admits of a reference to the leases prior or subsequent to the settlement. The words of the clause in question are: “And so as there be contained, in every such lease, a power of re-entry for non-payment of the rent thereby to be reserved.” Neither does the clause itself, taking it in the substance, nor does any word of it, by

1819.  
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 Doe
 d. JERSEY
 v.
 SMITH.

1819.
DOE
d. JERSEY
v.
SMITH.

itself, impart a reference to any prior state of the property. I am of opinion, therefore, that this evidence cannot be used in the construction of this power. This brings me to the construction of the power itself. The question is, whether the power authorises the terms of re-entry, contained in the lease of the 5th September, 1803, which are, "If it shall happen that the rent, &c. shall be behind, or unpaid by the space of fifteen days, and no sufficient distress or distresses can or may be had and taken upon the said premises." I am of opinion, that these restrictions are not authorised by the power. *First*, because the words of the power have, in my apprehension, a plain and specific meaning. A clause of re-entry, if the rent shall be behind, is a perfect idea, wanting no explanation, and it is a very different thing from a clause of re-entry, if the rent shall be behind fifteen days; and the difference is still greater if you superadd, "and in case no sufficient distress can be had on the premises." It must be recollected, that this is a power for a lease to be granted by a tenant for life, without which he could make no lease which would not expire with his death. It is a power contained in a deed, and it is quite a new practice, under such circumstances, to extend the construction of such a power beyond its meaning, to be collected from the face of the deed. If any lawyer's attention had been drawn to these words, before the lease was granted, I am persuaded he would not have signed his approbation of a draft of a lease in the terms, in which this is framed. On these occasions men, after the thing is done, are apt to look at the lease, and advert to the consequences of holding it to be bad; and to treat the authority, under which it is granted, more lightly than in such a case it ought to be done. *Secondly*, it is suggested, that this clause in the lease must mean, that the power of re-entry must be a rea-

sonable one: but who is to judge of that; the parties to the deed, or the Court, or the Jury? If the Court or Jury are to judge, what definite rule is there to govern their decision on the subject? This is to introduce a difficulty which I know not how to combat. I am of opinion, at all events, that such an idea cannot be admitted to govern our construction, if it varies the construction of the parties' meaning, to be collected from the words of the deed itself. *Thirdly*, the words and meaning of the parties in the deed, I hold, to be binding on me: I cannot read this deed without a conviction, that the parties meant a pure and simple clause of re-entry. The second power enables the successive tenants for life to make leases for a term of years not exceeding twenty-one years, in which the parties provide, that there shall be a clause of re-entry for non-payment of rent, if the same shall be behind or unpaid by the space of twenty-eight days, after the times thereby appointed for payment. This affords to me an irresistible argument in favour of the generality of the former power. The parties have used general terms in the formation of the first power, and special terms in the formation of the second, on the same subject of entry in the case of rent being in arrear. The lease in question cannot be maintained, unless we hold, that the lessor had a right to bind the inheritance with both these restrictions: First, that no one shall enter, unless the rent shall be behind fifteen days. Nor, secondly, if sufficient distress can or may be had or gotten on the premises. I consider these restrictions as contrary to the meaning of the power, not in conformity with it, and prejudicial to the inheritance. As to the clause of distress, it appears to me, that the case of *Core v. Day* (a) is precisely in point: and I agree with the learned

1819.

 DOE
 d. JERSEY
 v.
 SMITH.

(a) 13 *East*, 118.

1819.
DOE
d. JERSEY
v.
SMITH.

Judges, who signed the certificate in that case. That such a clause is attended with the greatest inconveniences to the remainder-man, we have the authority of the Court in *Coxe v. Day*, and we have it practically exhibited in the case of *Rees d. Powell v. King (a)*. This was very ably argued at the bar, and a great number of cases were cited; but the two cases I have alluded to, and the plain intention of the parties expressed in the deed, govern my judgment. I have only to add a word with respect to the general clause of re-entry, towards the end of the lease. It was observed at the bar, that the word "*rents*" is omitted in it: if the clause does not extend to rents, then it has no bearing on the subject. I think it cannot be contended, that the parties meant it should have application to a case which was before fully provided for, and which the powers required to be expressly provided for, and therefore, I think, the word *rents* was designedly omitted. This clause was adverted to in the Court below, but does not appear to have been there treated as a matter deserving much notice, nor has it been so treated in the course of the argument here. I have considered this case with every possible attention, and an anxious wish to find myself justified in concurring with the affirmance of that judgment; but, finding I cannot do this without sacrificing the opinion I have formed on great attention to the subject, I am obliged to pronounce my opinion to be, that the judgment of the Court of *King's Bench* cannot be supported, but ought to be reversed.

Mr. Justice PARK.—This special verdict having been so fully stated by my learned brothers, it is not necessary that I should take up the time of the Court in restating it, because I think it will be sufficient to advert to two

(a) *Forrest*, 19.

clauses only contained in it, on which alone, in my apprehension, the question turns. Being about to give my opinion, that the judgment of the Court of *King's Bench* ought to be reversed, I own I do so with great diffidence in my own judgment; but, thinking, as I do, upon the point, it is my duty, notwithstanding the great learning, weight, and authority due to those who pronounced that judgment, as well as the respect due to those, from whom I have the misfortune to differ upon the present occasion, to declare my real opinion; and my only consolation is, that, in coming to the decision I have formed, I do not stand alone, but have equal learning and ability to support me. This case has been argued very elaborately, with very considerable talent, at great length, and with much research; but, notwithstanding the length of the arguments, the question in itself is a very short one, and requires, I conceive, no very extensive discussion; for it is simply this: Is the lease of the 5th *September*, 1803, conformable to the power contained in the deed of *July*, 1757? Let us see what the power is, and what the restriction. The words are, "and so as there be contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved." These are the only words material to our present inquiry, and they seem to present no difficulty to the mind; for, if a plain man were asked how he would execute such a power, he would say, insert a clause, that if the rent be not paid as reserved in the power, the lessor shall have power to re-enter. How much then must he be surprised to find two conditions, which he will in vain look for in the power, but which materially alter the rights of the remainder-man! The words are these: "Provided, that if at any time during the estate hereby granted the said yearly rent or sum of two pounds, or any of the duties, services, reservations, and payments hereby reserved shall be be-

1819.
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 DOE
 d. JERSEY
 v.
 SMITH.

1819.
DOE
d. JERSEY
v.
SMITH.

hind, unpaid, or undone, in part or in all, by the space of fifteen days next over or after any or either of the days or times, whereat or whereupon the same ought to be paid, done, or performed; and no sufficient distress or distresses can or may be had or taken upon the said premises, whereby the same, &c. may be fully paid;" (and then come several other clauses not material to our present inquiry;) "then and from thenceforth, in all, or any, or either of the said cases, it shall and may be lawful to and for the said *George Lord Vernon*, his heirs and assigns, and the person or persons, to whom the freehold or inheritance of the premises shall as aforesaid belong, into and upon the said premises hereby demised, and every part and parcel thereof, wholly to re-enter." I admit, that, in construing powers, the intention of the creator of the power is to be attended to, as it is to be collected from the instrument itself, and therefore, perhaps, it is not correct to say that powers are to be construed favourably for the remainder-man. I should rather say they are to be construed strictly, according to the intention of him who gave the power; but there is no ground for leaning either to the tenant for life or the remainder-man; and this seems to be the opinion of the Court in the cases of *Goodtitle d Clarges v. Funucan* (a), and *Pomery v. Partington* (b). For a power to make leases is given and intended to operate beneficially for both parties; that he, who had only an estate for life, might grant something like a permanent interest, to induce the farmer to cultivate and improve the ground, by which the tenant for life and the remainder-man is equally benefited: the one, by enjoying during his life a well-cultivated estate, and the remainder-man, by not coming to an impoverished one. But still the execution of the power must be such by the tenant for life,

(a) *Doug.* 565.—(b) 3 *Term Rep.* 674.

that the remainder-man is not prejudiced in point of remedy for his rent, nor any other circumstances which the maker of the power intended he should enjoy. Can any one on reading this lease, and comparing it with the power, say that it is at all conformable to it? and is not the remainder-man placed in a situation less beneficial and advantageous than the maker of the power intended? To say the contrary will be to argue, that a clause limited and clogged with conditions, is as beneficial as one unlimited and unclogged. If this case turned entirely upon that part of the clause, which does not enable the party to re-enter unless the rent has been in arrear fifteen days, the power having no such clog; as at present advised, this would, in my opinion, be sufficient to avoid the lease. It is said this is nothing more than a reasonable time; but if fifteen days be reasonable, why may it not as well be contended that twenty, thirty, or forty days are a reasonable time, as that fifteen are? The maker of this power never contemplated it in this case; nay, she even contemplated the contrary; for whenever she meant to give time, she has said it expressly, and therefore well knew, that whatever were her intentions, it was necessary to express them; for immediately after this clause, she enabled the making of leases of other parts of the property, and expressly gave the power of re-entry for non-payment of rent only, *if it be unpaid for twenty-eight days*; and therefore, nothing, in my mind, can be a stronger argument in this case against the validity of this lease than this very circumstance; for the permitting it to be done in the one case amounts to a clear prohibition in the other. But it is not absolutely necessary to insist upon this, because it is quite clear, that if the power be badly executed in one respect, the lease is altogether void; and upon the second point of objection, with all the


1819.
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 DOR  
 d. JERSEY  
 v.  
 SMITH.

1819.  
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 DOE
 d. JERSEY
 v.
 SMITH.

deference I most unfeignedly feel for the very learned Judges who have differed, and those who now differ from me, I have never been able to entertain a doubt. The words are, "so as no sufficient distress or distresses can or may be had or taken upon the premises." Is this no clog or impediment to the right of the remainderman? Is it no injury to him in the enjoyment of his estate, that he cannot enter for the condition broken, till he has searched every corner of the estate for a sufficient distress? This condition appears to me to be a very serious restraint, unauthorised by the power. There is no doubt, but that what I have just stated is so, and has been so decided by the whole Court of *Exchequer*, confirming, by that decision, the opinion of a most learned Judge (Mr. Justice *Heath*), and upon this principle only, that a clause of forfeiture in a lease, in case no sufficient distress be found on the premises, must be strictly pursued; and in case of a distress being made, every part of the premises must be searched. The case I allude to is that of *Rees d. Powell v. King (a)*, which was an ejectment for a cottage, tried before Mr. Justice *Heath*, at *Hereford*, in 1793. The summary of the case is this, that a clause of forfeiture in a lease, in case no sufficient distress be found on the premises, must be strictly pursued; and that, in case of a distress being made, every part of the premises must be searched, before it can be concluded, that there is no sufficient distress. The learned Judge nonsuited the plaintiff in that case; and after very mature argument that Court held, that as to the forfeiture of the lease, the rule of convenience, in cases like this, is, that a party making a distress must look into every part of the premises before he re-enters; else how can he say there was no sufficient distress?

(a) *Forrest*, 19.

But this very point also appears to have been expressly decided in the case of *Coxe v. Day (a)*, where, under a leasing power, with a condition for re-entry for non-payment of rent in twenty-one days, a lease was granted with a condition for re-entry for non-payment of rent in twenty days, in case no sufficient distress can be taken on the premises, whereby to levy the rent, which was held not to be a good execution of the power : such conditional power of re-entry being less beneficial to the remainderman, than an absolute power of re-entry for non payment of rent. In the course of that argument (for it was a case where the Judges were to certify their opinions to the Court of *Chancery*), Lord *Ellenborough* said, " There can be no doubt, that it is more beneficial to the owner of the estate to have a power of re entry at once upon the tenant, upon non-payment of the rent within a certain time, than to have such a power only in case there shall be no sufficient distress upon the premises, from time to time, as the rent shall fall in arrear. This is precisely the case in question ; and in another place his Lordship said (and which is very material), " In the one case, the rent is secured from time to time by successive suits, with the risk of sureties if the distress be replevied ; in the other, it is secured *once for all* by the landlord's repossessing himself of the land out of which the rent is derived." In another place, his Lordship said, " Surely the direct power of re-entry is more beneficial to the landlord ;" and again, the act of 4 *Geo. 2. c. 28.* having been quoted by the present Lord Chief Justice *Abbott*, Lord *Ellenborough* said, " The very provision of the legislature shews that there is a difference in this respect ;" and the Judges afterwards certified their opinion, that the lease was not made in conformity to the power, and was therefore

1819.

 DOE
 d. JERSEY
 v.
 SMITH.

1819.
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 Doe  
 d. JERSEY  
 v.  
 SMITH.

void. On these grounds, therefore, I think the lease in question cannot be supported. But it has been said at the bar, that a general clause of re-entry, which is to be found in the lease, will control the special clause. To that doctrine I cannot agree, because, if I do, all the decisions, from the time of Lord Coke to the present day, must be overturned. In *Sheppard's Touchstone* (a), it is said, "If there be two clauses or parts of the deed repugnant the one to the other, the first part shall be received, and the latter rejected, except there be some special reasons to the contrary." In *Cotter v. Merrick* (b), Baron Nicholas says, "Where there are two clauses in a deed, of which the latter is contradictory to the former, there the former shall stand." In *Thomas v. Howell* (c), "In deeds it is admitted (say the Court), that subsequent clauses which are general shall be governed by precedent clauses which are more particular." And again, in *Altham's case* (d), *Generalis clausula non porrigitur ad ea quæ specialiter sunt comprehensa*. Subsequent words may qualify and abridge, but not destroy. And indeed, in this case, the learned counsel, who last argued in support of this lease, and in favour of the general clause, was obliged to admit that Lord *Ellenborough* had intimated a strong opinion against the validity of his argument in this respect. I am, therefore, also of opinion, that this point will not support the lease; for this general clause would completely nullify the special power of re-entry. The other point in this case was, whether the former leases were admissible to explain this? In answer to which, I say that, according to my opinion, this deed has nothing ambiguous in it. It is clear and precise: every man who reads it with a legal mind can give it a clear and satisfactory solution. This power and lease contain no

(a) *Pages* 87, 88.—(b) *Hardres*, 94.—(c) 4 *Mod.* 69.—(d) 8 *Rep.* 154. b.

reference to former leases, or their terms, and if it had, the Master of the *Rolls* in *Baynham v. Guy's Hospital* (a), said, "I strongly protest against the argument used by the Judges in *Cooke v. Booth* (b), as to construing a legal instrument by the equivocal acts of the parties, and their understanding upon it; and in the subsequent case of *Eaton v. Lyon* (c) the same learned person said, "a legal instrument is not to be construed by the acts of the parties." The same doctrine in this Court of *Exchequer Chamber* was maintained in the case of *Iggulden v. May* (d). But this very point was, in effect, decided in *Doe d. Allan v. Calvert* (e). It was there held, that, as the lease did not conform to the power, it was void, although such lease were according to the custom of the country; and the same had been before granted by the person creating the power. It is true, no question was there raised as to the evidence being admissible; but if, when admitted, the Court would give no effect to it, it ought not to have been admitted. But, without adverting to cases, I am of opinion that no evidence can be admitted to explain a deed, which is plain and perspicuous in its terms, and contains no ambiguity. Upon the whole, I am of opinion, that the judgment of the Court of *King's Bench* ought to be reversed.

Mr. Baron Wood.—The question, in this case, arises on a lease which was executed under a power contained in Lord *Vernon's* marriage-settlement; and it is, whether this lease is warranted by the power of leasing contained in that settlement; if not, the lessors of the plaintiff will be entitled to recover, but if it is

1819.  
  
 DOE  
 d. JERSEY  
 v.  
 SMITH.

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(a) 3 *Ves. Jun.* 298.—(b) *Cowp.* 819.—(c) 3 *Ves. Jun.* 694.—(d) 2 *New Rep.* 449.—(e) 2 *East*, 376.



1819.  
Doe  
d. JERSEY  
v.  
SMITH.

according to that power, then they are not entitled, and the judgment of the Court of *King's Bench* must be affirmed. There are three distinct powers of leasing contained in this marriage-settlement, applicable to three different modes of letting, and in which those different modes are prescribed. The first power to lease, refers to lands leased for lives, or years determinable on lives, to any person or persons in possession or reversion; and one of the conditions of such letting is in these words: "And so as there be contained in every such lease a power of re-entry, for the non-payment of the rent thereby to be reserved." The second power of re-entry applies to leases for years absolute, not exceeding twenty-one years, to take effect in possession, and to be made at as beneficial a yearly rent as was then paid, or the most improved rent without fine or foregift; and there it is provided, "That there be contained a clause of re-entry, in case the rent or rents, thereupon to be reserved, be behind or unpaid, by the space of twenty-eight days, after the times appointed for payment." There is also a third power to lease lands for mining, and in that no power of re-entry is reserved at all. The lease in question is made under the first power, which provides for a re-entry for non-payment of the rent generally, without prescribing any time of re-entry at all, or any special terms whatsoever. These are the powers. The proviso in the lease in question is, "That if the yearly rent of two pounds, or any of the duties, services, reservations, and payments thereby reserved, shall be behind, unpaid, or undone, in part, or in all, by the space of fifteen days, after any of the times of payment or performance," then there is this condition, "and no sufficient distress or distresses can be had, or taken, whereby the same, and arrearages, may be raised; engrafting upon this power the terms con-

tained in the statute of 4 *Geo. 2. c. 28*. It is contended, on the part of the plaintiff, that the proviso of re-entry in the lease is not such a one as is required by the settlement; and for two reasons, inasmuch as there is a time limited for re-entry in this lease, whereas the settlement is narrower, and gives no time; and inasmuch as it is clogged with a condition, that there be no sufficient distress, which the settlement does not mention. The clause upon which this lease is founded, requires no more than a power of re-entry for non-payment of rent, giving it no modification or qualification at all; and there is in the lease a clause of re-entry, so that in terms the lease complies with the settlement. But though the power is general, I admit that it must not be executed in an illusory, but in a reasonable manner, and in such a manner as the law will deem reasonable: for I conceive that the law will judge of the operation of a power, as well as it will judge what is a reasonable execution of it, where no specific terms are appointed. In the clause of re-entry for the rack-rents, a time is limited, that is to say, eight-and-twenty days: I admit that cannot be departed from. Why was no time limited in this power? Because the settlement meant to leave it, as I conceive it, to the discretion of the tenant for life, to insert such a reasonable power of re-entry as might secure the rent to the reversioner; for, where no precise terms are limited at all, the inference of law is, that it must be executed in a reasonable manner, and the law will take notice what is a reasonable manner. The law will take notice, whether it is executed in an illusory manner or not; as, for instance, where a party gives to a person the power to appoint portions to his children, as he shall think proper, if he shall in substance give all to one child, that will be an illusory manner of executing the will of the donor; and the law

1819-  
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 DOR
 d. JERSEY
 v.
 SMITH.

1819.
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 DOE  
 d. JERSEY  
 v.  
 SMITH.

will not permit such an execution of it. The object of a clause of re-entry is merely to secure the rent, and it has always been so considered at law and in equity; and when I see that object is secured reasonably and fairly, and when we are not tied down by any specific terms, I am not to look out for what I conceive in this case to be a mere *apex juris* to defeat the intention of the parties. I think we ought to construe deeds and acts *ut res magis valeat quam pereat*; and one case was cited on the part of the lessor of the plaintiff, in which the right and true principle, on which these powers are to be considered is, I think, well laid down. That was the case of *Cother v. Merrick* (a), which has also been referred to by my Brother *Park*; and it was particularly mentioned and referred to by Mr. *Jervis* in his argument. There the question arose upon a special verdict; and was, whether a lease, which had been executed by a tenant in tail, was conformable to the powers which were granted for making leases by tenants in tail, by the the statute of *Henry 8.*—On a special verdict, it was found that *Robert Earl of Essex* was seised in tail to him and the heirs male of the body of his grandfather, of the manor of *Pembroke*, and that he died seised; that his son entered, and made a lease by deed for twenty-one years to Sir *John Merrick*, rendering rent to the lessor; it also assumed the son's death, and found that after his death the estate tail descended to one who was not heir at law to the lessor; and the question was, whether this was a good lease within the statute of 32 *Hen. 8. c. 28.* That statute has provided, if a tenant in tail make a lease of an estate tail, that (b) "upon every such lease there be reserved yearly, during the same lease, due and payable to the lessors, their heirs

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(a) *Hardres*, 89.—(b) *Sec. 2.*

and successors, to whom the same lands should have come after the deaths of the lessors, if no such lease had been thereof made, and to whom the reversion thereof shall appertain, according to their estates and interests, so much yearly ferm or rent, or more, as hath been most accustomedly yielded or paid." Now in this case, the estate tail, after the death of the lessor, descended to a different person, who was not the heir at law; and the rent was reserved to his "heirs and assigns alone," so that there was not a rent reserved in terms to the persons who were to succeed to the estate after the death of the lessor; but it was reserved to the heir of the lessor, which certainly was departing from the power contained in the act of parliament. Still, notwithstanding that, the Court, in order to give effect to it, considered that it should operate so as to lease; although the terms were to the heirs and assigns, or the heirs generally, yet it should take effect for the benefit of the persons in remainder, and go to them. If they had considered these powers, and given a very narrowed construction to them, most undoubtedly they would have done it in that case, because, certainly in words, the reservation did not conform to the act of parliament. In that case Mr. Baron *Hill* said, "And in the exposition of statutes, Judges must make such a construction as to advance, and not to frustrate the intention of the makers." So I say, in cases of settlement. In cases of powers reserved by settlement, we ought to do the same; and he added, "if by any reasonable construction of law it can be so." Mr. Baron *Parker* assented, and said, "It is the office of a Judge to preserve, and not to destroy, an estate." These, I conceive, are the true principles upon which we should look at all these acts. In the last-mentioned case, the Judges gave that operation to the power, which, in all proba-

1819.  
 DOB  
 d. JERSEY  
 v.  
 SMITH.

1819:  
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 Doe
 d. JERSEY
 v.
 SMITH.


bility, corresponded with the intention of the parties, although, in words, it was contrary to the proviso contained in that act of parliament. Then there are two points as to time; for I consider that this settlement has left it in the power of the lessor to insert a reasonable proviso for re-entry, and has not tied him down in this case, as it has in the other, to twenty-eight days: this being left at large, I think that the true operation and effect of it is to leave it to the discretion of the lessor to insert a reasonable power. Then, is this a reasonable power in point of time? The period is fifteen days. In the other clause, the period prescribed by the donor is eight-and-twenty days, which is almost double the time; then, surely, fifteen days must be considered a reasonable time. I lay no great stress on the finding of the Jury, although I think it is not entirely to be put out of the question, because it is found by the Jury that other leases have been executed, and that this is the usual time inserted in them. I think that is a fair criterion, from which we may judge of the reasonableness of the provision. In *Coke Littleton*, it will be seen, from the instances which he puts, what he considers a reasonable time: he says (a), "If it happen that the rent be behind by a week after any day of payment of it, or by a month after any day of payment of it, or by half a year, the law will judge what is a reasonable time." I only make use of this to shew that at that time these provisos were considered to be reasonable. Then, supposing this to be reasonable in point of time, the last objection, and which was mostly, if not entirely relied on, was, that the right of re-entry was clogged with the condition of there being no sufficient distress upon the premises: is that, then, a reasonable condition

(a) *Co. Litt. s. 328. 201. a.*

to be inserted? With reference to the law, as it then stood, I conceive it was clearly reasonable: the statute 4 Geo. 2. c. 28. has considered it to be reasonable that the lessors, where they had a power of obtaining the rent, should not enter, if there was a sufficient distress; and where is the difficulty? Here is a rent of forty shillings: the lessor might have an action for it, immediately when it became due, or there might be a distress. Can it be supposed that there would be any difficulty in finding a distress for forty shillings upon an estate? A sheep might be taken, or a horse, or the parties might go into the house, and there they would find a table, or chairs, or some articles answering to that value: it is mere fancy to suppose, that there would be any difficulty in finding a distress. Now I take the liberty of adverting to the statute 4 Geo. 2., on which I wish that there had been a little more argument and consideration, as well in the case of *Care v. Day* (a), as in the case before us: as the date of this deed of settlement was in the year 1757, which was after the passing of the statute of the 4 Geo. 2.; for that was passed in the year 1731, and regulates the powers of re-entry for non-payment of rent. Before the making of that statute, the carrying into execution a power of re-entry was attended with great difficulty and nicety: there must have been a demand of the rent upon the land: if the subject leased were a house, the rent must have been demanded at the fore door, and it must have been demanded at a convenient time before the sun-setting of the last day of payment, so that the money might be numbered. After the lessor had done that, the law required him to make an actual entry, and bring an ejectment; and if all these things were not critically and exactly performed, the lessor lost the right of re-

1819.
DOE
d. JERSEY
v.
SMITH.

(a) 13 East. 118.

1819.

 DOE
 d. JERSEY
 v.
 SMITH.

entry for that time, and was obliged to wait till other rent accrued, and then make a fresh demand and re-entry for the subsequent rent. This laid a landlord under great difficulty, and, therefore, it was thought right to remedy that inconvenience; but at the same time that the statute did that, it meant also to provide for the security of the tenant; and, therefore, it said, that the landlord, in such a case, should not avail himself of his power of re-entry, which is merely for the purpose of securing the rent, if he can be paid by distress upon the premises. All this was thought reasonable by the legislature; and if it could be deemed reasonable by them, why should it not be so estimated by individuals, when they are making a settlement applicable to the subject? It appears to me that there can be no better test of the reason of the thing, than by seeing what the legislature have done in similar cases. That a power of re-entry is merely for securing the rent, has always been considered; and in *Wadman v. Calcraft* (a), there was a forfeiture by the non-payment of rent, and a forfeiture likewise by the breach of several covenants. The Master of the Rolls there made these observations: "The plaintiff seeks to be relieved against a forfeiture of this lease, which he states to have been incurred solely by the non-payment of rent: and if that is the ground of this ejectment, there is no doubt equity will relieve against the forfeiture;—considering the purpose of the clause of re-entry" (it is for this passage that I cite it), "to be a mere security for the payment of rent, and that when the rent is paid the end is obtained; and therefore the landlord shall not be permitted to take advantage of the forfeiture." And even before the passing of the statute of 4 Geo. 2. it was the same. What then is the alteration

(a) 10 Ves. Jan. 68.

which is made by the statute? It has dispensed with the formalities attending re-entries at the common law, and has said, that where a landlord has a right to re-enter, and half a year's rent is in arrear, he shall and may at once bring his ejectment, and recover possession, provided there is no sufficient distress to be found on the premises to countervail the arrears then due: these are the terms engrafted into this settlement. By that case the tenant may pay or tender the rent and costs to the landlord or his attorney, or he may pay it into Court before trial, and all the proceedings shall cease. The policy of this law is to prevent forfeitures for non-payment of rent, and to facilitate the landlord's remedy for the recovery of it; and at the same time the legislature have thought it right to impose the condition, that the tenant shall not be ejected, if there be a sufficient distress to secure the rent. In this case, the landlord has security enough for his rent, because he may bring his action the moment it becomes due; or he may distrain the tenant when it accrues; and, after the expiration of fifteen days, if there be no sufficient distress, then his right of re-entry attaches. I make use of this statute, therefore, to shew the reasonableness of engrafting such a power into the settlement. But it does not seem clear to me, that the statute precludes any proceeding whatever by re-entry at the common law, and, if this case should hereafter come before Parliament, I hope that point will be a little more considered. If the statute does shut the door against proceeding by re-entry as directed by the common law, then *cadit questio*, because in that case the makers of the lease will have introduced more than the law has; and, no doubt, the penners of this lease did conceive, at that time, that it was incumbent upon them to make the same kind of provisions as the statute had made. I will shortly consider the question, whether the door of re-

1819.

 DOE
 d. JERSEY
 v.
 SMITH.

1819.
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 DOE
 d. JERSEY
 v.
 SMITH.

entry is not entirely shut by the statute. That statute begins by reciting, that "Great inconveniences do frequently happen to lessors and landlords, in cases of re-entry for non-payment of rent, by reason of the many niceties which attend re-entries at common law, and forasmuch as when a legal re-entry is made, the landlord or lessor must be at the expense, charge, and delay of recovering in ejectment, before he can obtain the actual possession of the demised premises; and it often happens, that, after such a re-entry made, the lessee or his assignee, upon one or more bills filed in a Court of Equity, not only holds out the lessor or landlord by an injunction from recovering the possession, but, likewise, pending the said suit, do run much more in arrear, without giving any security for the rents due, when the said re-entry was made, or which shall or do afterwards incur: for remedy whereof, be it enacted by the authority aforesaid, that in all cases between landlord and tenant," (and I lay some stress upon this expression), "from and after the 24th day of *June*, 1731, as often as it shall happen that one half year's rent shall be in arrear," (here the rent is reserved half-yearly), "and the landlord or lessor, to whom the same is due, hath right by law to re-enter for the non-payment thereof, such landlord and lessor shall and may," (so that here is the word, "*shall*," not merely "*may*;" but, if it were only the word *may*, I should have thought that it was imperative, in analogy to another statute which I will hereafter mention; but here it is "*shall and may*," without any formal demand or re-entry, serve a declaration in ejectment for the recovery of the demised premises in the usual way, and that shall be equivalent to the formalities of a re-entry." Here it is imperative, as it appears to me, that he shall not proceed as at common law: the statute dispenses with that proceeding, and abrogates it,

and directs, that he shall proceed in the usual manner by ejectment. The act then continues, "And in case of judgment against the casual ejector, or nonsuit, for not confessing lease, entry, and ouster, it shall be made appear to the Court, where the said suit is depending, by affidavit, or be proved upon the trial, in case the defendant appears, that half a year's rent was due before the said declaration was served, and that no sufficient distress was to be found on the demised premises countervailing the arrears then due, and that the lessor or lessors in ejectment had power to re-enter, then, and in every such case, the lessor or lessors in ejectment shall recover judgment:" but the lessor cannot re-enter in this case, unless there be an insufficiency by which he can obtain his rent by distress, so that here it is imposed upon him, that he shall not avail himself of the power of re-entry, if there be sufficient distress; then, the statute also provides that the tenant shall be at liberty to pay his rent into Court, and so on, thereby giving an advantage to the tenant. Now, in this case, it is asked, if the power of re-entry at common law is not taken away, why should it be left? It is quite nonsense to suppose that it can be left for any thing but as a security for the payment of rent; because, if the lessor could make a re-entry at the common law, and immediately distrain, the present defendant might file a bill in equity to restrain him. Neither law nor equity will permit the lessor, since the statute of 4 Geo. 2., to take any proceedings for any other purpose but for the security of the rent; and it appears to me, that that is the reasonable and fair and proper construction of the statute; for where would be the use of leaving a loophole for the landlord to make an entry at common law, in order to avoid this statute? The intention of the act

1819.
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 Doe  
 d. JERSEY  
 v.  
 SMITH.

1819.  
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 DOE  
 d. JERSEY  
 v.  
 SMITH.

is, that the lessor should have the same relief in a Court of Law, as he before had in a Court of Equity; it provides for the payment of rent into Court, and so on. It strikes me, that it is imperative upon the party to proceed in the way, which shall enable him to avail himself of this act, and it always has been so considered; for, I dare say, there will not be found, since this statute, a re-entry at common law: I never heard nor read of an instance of it; and what makes me think it is imperative, is the statute of 8 & 9 Will. 3., "An act for the better preventing frivolous and vexatious suits," in actions for penalties for the non-performance of covenants: that statute runs in these terms, "And be it enacted (a), That in all actions, which, from and after the 25th day of *March*, 1697, shall be commenced or prosecuted, in any of his Majesty's Courts of Record, upon any bond or bonds, or on any penal sum for non-performance of any covenants or agreements, in any indenture, deed, or writing, contained, the plaintiff or plaintiffs may," (not "*shall and may*," as it is in the 4 Geo. 2.) "assign as many breaches as he and they shall think fit, and the Jury, upon the trial of such action, shall and may assess, not only such damages and costs of suit as have heretofore been usually done in such cases, but also damages for such of the said breaches, so to be assigned, as the plaintiff upon the trial of the issues shall prove to have been broken, and that the like judgment shall be entered on such verdict as heretofore hath been usually done in such like actions." It is provided, in case of judgment on demurrer, that the plaintiff may suggest (always using "*may*") "as many breaches of the covenants and agreements as he shall

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(a) *Cap.* 11. s. 8.

think fit;" giving the defendant the opportunity of paying money into Court after such judgment is entered, and before the execution is executed. I remember the first case, almost, where this statute was brought into consideration, and that was the case of *Drage v. Brand (a)*, for, till that time, it had been always considered to be in the option of the plaintiff, whether he would proceed according to the course of the Common Law, or according to this statute; and therefore, in general, he assigned only one breach; and in *Drage v. Brand* that came to be considered, and there it was contended that the plaintiff had a right to proceed at the Common Law, and not upon this statute; and it was argued very much upon this, that the statute says he *may* assign, and that therefore it was left at his discretion, whether he would proceed upon the statute, or according to the course of the Common Law: however, the construction upon that statute in that case, and which has been followed in all the Courts of Common Law, is, that the statute has been considered as compulsory, and that such is the fair and liberal, and proper construction to be put upon it: for, where would be the use of suffering a man to recover his penalty, and then to oblige the defendant to go into a Court of Equity, where an issue would be directed? In order to prevent that circuitry, the language of the statute virtually is, they "shall" assign breaches, and so on; so here, I say, in analogy to this statute, the true and real construction, in my humble opinion, is, that by the statute of 4 Geo. 3. the power of re-entry at common law is abolished, and the lessor must proceed in the usual way, by serving an ejectment at the end of half a year, and cannot proceed in any other way. If I am right in the construction of that statute, there is an end

1619.  
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 DOE  
 d. JERSEY  
 v.  
 SMITH.

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(a) 2 Wils. 377.

1819.  
Doe  
d. JERSEY  
v.  
SMITH.

of this question; for the framers of this lease have inserted nothing in it but what is conformable to this statute. But I will suppose it to be left open to the landlord to proceed in the old way, as he might have done before the statute, and that a reasonable clause of re-entry is all that the power required: can the adoption of the same condition, which the legislature have adopted in similar cases, not be considered as a reasonable power? The case of *Core v. Day* (a) has been cited as an authority of the Court of *King's Bench*, that the insertion in a condition of re-entry, in a lease made under a power, of the words "in case no sufficient distress can be taken upon the premises," these words not being in the power, was not a good execution of the power. I must own, I should have doubted very much the propriety of that decision, and I wish that the operation and effect of the statute 4 Geo. 2. c. 28, had been brought more fully under the consideration of the Court; but, be that case as it may, it is different in one material feature from the present. The re-entry required there was, for the non-payment of the rent reserved by the space of twenty-one days: the Court considered that, as a precise specification, that the settlement had prescribed a particular form of re-entry, and that therefore it might, perhaps, be inferred that no other qualification would be warranted; but, here, there is no time limited: a power of re-entry, in general, is all which is required, and therefore, I should say, that a reasonable qualification was meant. But, it is plain, that the Court of *King's Bench* considered the present case as contradistinguishable from that of *Core v. Day*; for it cannot be supposed, at the time when they decided this case, that they had forgotten their own

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(a) 13 East. 118.

decision, which was made only a few years before, because there was the same Chief Justice in *Core v. Day* that there was in this case, and one of the same learned Judges (namely, Mr. Justice *Bayley*). They must have considered this case as distinguishable from that of *Core v. Day*; for, that very same Court decided, that this power had been reasonably and properly executed, and therefore they must have considered the former decision as wrong, or, that this case was distinguishable from it. They gave judgment for the defendant; and I am of opinion that their judgment was rightly and properly given, and that it ought to be affirmed.

1819.  
  
 DOE  
 d. JERSEY  
 v.  
 SMITH.

**Mr. Baron GRAHAM.**—It is with very considerable regret, that upon the present occasion, after the opinions which I have heard delivered, and those which I have reason to expect, I cannot, consistently with that respect which is due to them, express upon the present occasion, that which the duties of my own mind would suggest—a confident judgment.

The question springs out of a settlement of 1757, by which Lady *Vernon*, then the owner, and having the disposal of this estate, applied three distinct powers to three different descriptions of property. Of the first description are those lands which had been usually letten for lives, and which form the subject of the lease in question. Of the second, are those which were leased for years at a common and rack-rent; and the third relates to lands with mines, that were at that time parts of the estate. She has made a distinction with respect to the powers, between the leases of mines and leases of property of the two other descriptions, omitting to require the lessor to insert any power of re-entry on non-payment of rent in the case of mines, considering that her directions, that the leases of these mines should con-

1819.  
Doe  
d. JESSY  
v.  
SMITH.

tain the usual covenants in leases of property of that description were sufficient to guard the estate of the remainder-man; and it is observable, that she has been more explicit in the language, or the expressions used, of what the powers should be, as applied to leases for years, and as applied to leases for lives; very naturally being more anxious with respect to the reservation of those rents, on the leases of lands let for years at rack-rent, wherein the rent reserved constitutes the principal value and profits of the land, and expressing more indifference with respect to that species of property, of which, in point of fact, the whole profit may be said to be derived from the fines, which are a species of anticipated rent, and which constitute the substantial enjoyment and income, and the rent reserved is a mere nominal rent; for with respect to a property of this description, as to any beneficial enjoyment, the reservation of a rent of £2 may be treated as a rent of two shillings: it is merely a rent recognizing the relation of landlord and tenant, and upon that occasion she has used an expression with respect to the power so general, that, strictly speaking, it means nothing of itself; it necessarily refers to something extrinsic, either to extrinsic facts, or extrinsic judgment and opinion: for she has only said, so that there be contained in every such lease a power of re-entry for the non-payment of the rent thereby reserved. Now when I look at the description of this power, I cannot see what species of power is to be executed, but by a reference either to something extrinsic, something that had been done theretofore with the property, or at least by a reference to sound judgment and discretion in the specification of that which she has left in the most general terms. A circumstance is found on this special verdict, on which I do not rely in the formation of my opinion; but it is nevertheless material, *namely*, that at the very time of the exo-

cation of this settlement, and since, and up to the time of the surrender of that lease, which laid a foundation for a new lease in *September*, 1803, the then subsisting leases, and every successive lease, upon the surrender, contained precisely that execution of the power which the present lease contains; then the special verdict states the terms in which the present lease, of 1803, has been expressed, and finds that the power being such as I have stated, that this proviso is contained in it, "Provided always, that if it shall happen at any time that the said yearly rent of £2, and every or any of the duties, services, reservations, and payments hereby reserved, shall be behind, unpaid, or undone in part, or in all, by the space of fifteen days," which is not inserted expressly in the general terms of this power, "and no sufficient distress or distresses can be had or taken, whereby the same and all arrearages may be raised," then it shall be lawful for the party to enter. This being the execution of the power, and this the direction that is given in this deed, I would ask, what, in the name of common sense, was to be done by any person who had to pen such a lease, and to reduce into shape this general power; for all that Lady *Vernon* has said in the creation of this power is, that there is to be a power for re-entry for the non-payment of the rent. I have already hinted that this does necessarily refer either to something which had been done before, or at least to the exercise of some judgment or some opinion; because a man who takes up this power and reads it, and is to reduce it to plain and distinct language, cannot follow the precise words of it; "Provided always, that if it shall happen at any time that the said yearly rent of £2, hereby reserved, shall be behind or unpaid, the lessor shall re-enter:" then what is to be done in the execution of this general power? It seems admitted that

1819.  
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 Doe
 d. JERSEY
 v.
 SMITH.

1812.
 Doe
 d. JERSEY
 v.
 SMITH.

the rent is not to be paid on the very day: some reasonable time, therefore, may be allowed. I say then that something is to be done which is reasonable and proper. Now I will ask, what, upon such an occasion, is a man to do who has to pen this clause? He will say, I cannot follow the particular words: must I not express a day? Am I to bind the tenant down so, that on the close of the first day of the payment of the rent, the landlord shall have his power of re-entry immediately, and put the tenant to the difficulty of an application, either to Equity or to Law? Shall I so pen it, as to make it revolting to any man who might otherwise be disposed to take it? What, if a person do not pay his trifling rent before the last hour of the day at which it is due, *namely*, £1 rent for the half year, is he to be turned out, and driven to a Court of Equity? As the Law and Equity then stood, that would have been his only resort; because in literally following the words of the powers, it must be a re-entry at Common Law. Then, something reasonable is to be done. What other test of what is reasonable can possibly be offered, than either that which had been done from the very first time of the enjoyment of the property, or at least that which is adequate and commensurate with the occasion? This, I confess, seems to me the best test of what is to be done upon the present occasion, and solves all the difficulty which has struck very intelligent minds. Who is to judge of the reasonableness of this? Is the Judge to examine the reasonableness of it, or a Jury? The Jury are not the judges of it; but where the creator of the power has said, there shall be a power of re-entry, it is necessarily required that the person who prepares the lease must give it a specific form, and the Court must finally judge whether he has followed the intention of the donor. I do not mean to say that "*a*" power means *any* power a person may choose to insert; but a power

commensurate with the occasion. Then I resort to that which cannot be denied, that the clauses of re-entry are only to secure the payment of the rent: they were always so deemed both in Law and Equity, and it is a very important consideration, when we see what was the original execution of this power conceived in the general words of it. What can be more reasonable than to resort to the state of the Law at that time? At that period the Law as well as the Equity stood precisely as it does at this day; for not only was there an old Equity, which the Courts of Equity exercised before the statute of the 4 Geo. 2, but there was then that statute to serve them as a guide of what was reasonable and proper and suitable to the occasion. When I state the proposition, that these clauses for re-entry are only for the non-payment of rent, I speak the language of every man who has ever sat in a Court of Equity, or read what has passed in that Court. And I will venture to assert, that this is the sole occasion for it, and that there never was a period antecedent to the 4 Geo. 2, or even in the history of this country, where Courts of Equity did not relieve in every species of these clauses, whether they were for re-entry and enjoyment, or to hold as before, the lease, or a clause that the lease should be absolutely void. It always was the province of a Court of Equity (for these covenants and clauses were introduced from the old estates upon condition), to treat those rights of entry as forfeitures; and it was the constant province of a Court of Equity, in all these cases, to relieve from the forfeiture, when the compensation is in the case of non-payment of rent, clear and plain, and easily to be ascertained; and there the Courts of Equity have said, that the lessee shall be restored to the possession of the estate, and the lessor shall be en-

1819:
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 DOE
 d. JERSZY
 v.
 SMITH.

1819.
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 DON  
 d. JERSEY  
 v.  
 SMITH.

joined from proceeding farther, when the lessee is ready to pay the rent and all costs; but it was thought to be a very vexatious thing, that a party for rent, and of all things for a nominal rent, a rent of £2, which I may assume for the purpose of this argument as a rent of two-pence, should be driven into equity, and therefore the legislature have interposed a provision upon that occasion. The statute 4 Geo. 2. recites, meaning at the same time to relieve landlords, that there were very great difficulties and niceties in those entries at common law; the demand was to be made at particular places, and at particular times; these previous steps were liable to be controverted; they were traversable at law, besides which the party was laid under very considerable difficulties afterwards, in going or sending his servant to demand the rent, being liable to mistake the time or the place of demand, and therefore the legislature take it up in proper circumstances, and say, we will relieve you from these difficulties, but we will do it upon your performing that which common sense and reason require. In the first place, you shall not enter unless the rent be in arrear for half a year, and there be a clause of re-entry in the lease, and this privilege cannot be granted, in case there is a sufficient distress upon the premises, because it would be an extreme hardship, to drive the party into a Court of Equity, if there is over the next hedge where the lessor may look, abundant to pay and satisfy his rent; and therefore if those terms are complied with, the legislature have very properly dispensed with a formal demand and entry. By the statute 4 Geo. 2. c. 28. it shall be sufficient to serve a declaration in ejectment, provided that be not done, which is oppressive; and when the lessor has a ready remedy at hand, that he do not resort to the expedient of entering the premises.

This was the provision the statute made at that time, and this was the state both of law and equity when this power was created. I will now ask, in plain common sense, when we look to the generality of this power, so plainly expressing a difference in the mind of the creator of it with respect to these nominal rents, whether any man of sense and understanding, penning an execution of a power of this sort, would think that he could have a better guide for it than the direction of the statute, and the qualification of there being no sufficient distress upon the premises; and above all, would it not be revolting to common sense, to suppose that a power should be given either confined to the particular day, or according to the argument, admitting a reasonable time for it; but that it should be confined to the last hour of that day, and that the party should have the power of re-entry for the mere nominal half yearly rent of £1, when looking over the first hedge, he would perhaps see a hundred head of cattle? for can we, when we reason upon a case of this description, overlook the circumstances or the nature of the tenure? can we conceive any difficulty that this qualification, and this clog impose upon the party, when it says, that he shall not enter if there be a sufficient distress to pay his twenty shillings? Here, there is a purchase in fact, because these leases for lives are fully purchased with the reservation of a mere nominal rent; they are purchased by a man who buys the estate for three lives. He has a great property; can we possibly conceive either of those difficulties which have been pressed upon the Court? first, the danger of replevin. What! are we to conceive, that a tenant having a beneficial estate, will resist the payment of £1, and undergo the expense of applying to the Sheriff's Court and replevying the distress, or that any lessor should think that he was at all in danger, of the non-payment of £1


1819.  
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 DOE
 d. JERSEY
 v.
 SMITH.

1819.

 DOR
 d. JERSEY
 v.
 SMITH.

rent. Another difficulty has been suggested, which is that every part of the premises must be searched, and that it is very likely there may be some barn or a dunghill in a remote part of the estate which may have been overlooked, and which would have paid £1 rent. Can it be supposed that property of this sort would be in that dismantled state, that a man should be at a loss, and have to search every corner to pay himself a pound? These are arguments which I think ought not to weigh upon minds intelligent, liberal, and enlarged. Another argument is used, it is said (and I perfectly agree with that) that in the execution of this power, the great object is this, that upon no occasion shall the remainder-man suffer in any respect, nor be put in a worse condition: so it is said, that these powers have been transferred from Equity into Law, and that an equitable and liberal construction shall be put upon them, and that they should always be construed so as that they may be reasonable; they should be construed equitably, but in such a way as not to be injurious to the tenant, or to the reversioner, or remainder-man next entitled to these rents. But let me only present for consideration, what possible injury can arise to that person in remainder, under the power as it now stands. By a strict and literal execution of this power, he is to have a power of re-entry at Common Law, by an execution of it, according to its spirit and intention he has a beneficial power of re-entry, which dispenses with many inconveniences under the protection of the equitable statute of the 4 Geo. 2. Which is the most beneficial situation? In one case, if you adhere either to the strict words of the power, or if you leave this clause unqualified, you leave the party to all the difficulties he has at Common Law, to enforce the payment of his £1 rent. In order to get such rent, he must make his demand, he must

make his entry, and he has no relief from the statute; whereas, if you annex to it this qualification, you put the remainder-man into the easiest situation that can possibly be, upon the supposition, that he can wait for half a year for the payment of his £1, and if he can do so, he is put in a much better situation than by only giving him the benefit of the Common Law, because if you can suppose that a property of this kind should not afford a distress of £1, he has an easy remedy under the statute, of serving a declaration of ejectment, and every formal preliminary is dispensed with. This is the course of argument to which my mind has been led, and which has produced in it considerable conviction. But we are pressed with authorities, and it is supposed that the case of *Coxe v. Day* (a), in point of fact, has decided the present question: now I wish that that case should be contrasted with another, which I shall refer to, *namely*, that of *Hotley v. Scott* (b). I can only say, with respect to *Coxe v. Day*, that I so far concur with my learned brother Wood, who has gone before me, as to express some little disposition to differ from that case, though that was not the case of an estate for lives at a nominal rent; but I would not venture to say I differed from that case, if I did not know from a note, which, though not accurately reported, perfectly convinces me of what did pass, that the case of *Hotley v. Scott* warrants me to dispute the authority of *Coxe v. Day*, because I take the former to be diametrically opposed to the latter, and therefore I may say, *magno se Judice quisque tueretur*, when I venture to declare that I completely disagree with the case of *Coxe v. Day*, and that I think that it was one of those constructions of the execution of a power, which was neither agreeable to Equity nor to Law. I think

1819.

 DOE
 d. JERSEY
 v.
 SMITH.

(a) 13 East, 118.—(b) *Lofft*, 316.

1919.
DOE
d. JERSEY
v.
SMITH.

myself supported by the case of *Hotley v. Scott*, which I take to be a decisive opinion of a Court, as well filed, perhaps, as either that, or any other Court in the kingdom could be filed: and when I say this, it seems to me quite sufficient to mention the names of Lord *Mansfield* and Mr. Justice *Aston*. I do not read the case of *Hotley v. Scott*, because I think it quite sufficient to refer to it, for to my mind Lord *Mansfield*, in delivering the opinion of the Court, decides the question in the most express terms. There was one question there, which does not arise here, which was immaterial, and was so treated by the whole Court: there, the power of re-entry was reserved to Sir *John Ashley*, and his heirs and assigns, instead of being to the person next entitled in reversion or remainder; but a proviso similar to the present was annexed to it, *namely*, if no sufficient distress should be found on the premises. Mr. *Dunning*, who argued that case, put the latter objection forward, and mainly relied upon this difference, by the annexation of the qualification; and Mr. *Bearcroft*, for the defendant, seemed to consider the first question as of no moment, and principally argued upon the second, that the clause of sufficiency of distress was no injury at all to the party, that it was doing no more than that which the statute had pointed out, and that it was perfectly adequate to the occasion. These clauses of re-entry being merely to enforce the payment of rent, he put it on that ground, and Lord *Mansfield* in express terms adopted the argument, though according to the note I have seen, I do not perfectly understand some parts of the reasons of the opinions given by him; but I am quite clear, that the note taken at that time, by a very respectable, but then a very young man (a),

(a) *Mr. Loft.*

did not, and could not mistake the decision of the Court. But I do not mean to give the arguments which Lord *Mansfield* used upon that occasion: his decision was founded upon this, that the clause of re-entry being merely for non-payment of rent, whatever was adequate to that purpose was sufficient, and that it would be contrary to the spirit of the statute, and contrary to reason, that the lessor should enter for the non-payment of rent when there was a sufficient distress to satisfy him; and there it is to be observed, it was a beneficial rent, not a nominal rent, as this is; but even in that case, Lord *Mansfield* thought, that it was no more than a reasonable and proper qualification, and with that qualification, he and all the Court held it to be a valid execution of the power. Having expressed myself so fully upon that case, I shall not examine minutely, whether this extrinsic evidence should have been referred to, because I ground myself upon the circumstance, that the proviso in this case is proper, being intended as a re-entry, and adequate to the occasion, merely being for the payment of the rent; and without venturing to go as far as my brother *Wood* has done on the present occasion, and to say, that the statute of 4 *Geo.* 2. has precluded every other mode of proceeding, I say, that my opinion is grounded upon this, that the clause of re-entry is suited to the occasion, sufficient and adequate, and that it wisely and properly takes this statute as its guide; and I say, in effect, it puts the remainder-man in a better situation, because the one, strictly construed, leaves him at large to his remedies at Common Law, and the other gives him the easy means held out by the statute; but I should not be at all afraid on the other question, if it were necessary to give my opinion. My notion is, that the extrinsic evidence was well referred to, as it constitutes part of the present case in point of fact; but I wish to

1810.
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 DOE  
 d. JERSEY  
 v.  
 SMITH,



1819.  
DOE  
d. JERSEY  
v.  
SMITH.

stand upon the main ground, and take this not to be a case of an *ambiguitas latens* or *patens*; it is a general direction which necessarily refers to the exercise of judgment to give it expression and form; and what can be a better exercise of judgment, than to see how the property was held from the first? Can we have a better guide than that which speaks by the mode which was used at the time, *namely*, by the subsisting and subsequent leases? Can any man say, that there is an ambiguity on the face of the deed? There is no ambiguity of expression, the language of the deed is clear in sense, but not definite or precise in the direction given; we cannot construe the power by the words in the deed, because they do not purport to describe or express the particular power, but merely indefinitely *a power*, and therefore it is neither in point of fact an *ambiguitas latens* or *patens*, but if it is to be construed as part of the deed itself, then it is an *ambiguitas patens*, because it stands on the face of it *a power* of re-entry: *a power* may mean a power with this qualification or without it, and then it cannot be aided by averment. But I contend, that being a general direction, it is a reference to selection and judgment, and if so, a person in the execution of this power cannot possibly do better than resort to the way in which it has been constantly used, and it relieves me from the authority of *Cook v. Booth* (a), on which I do not rest my opinion. I am restrained by what I learned under the excellent Judge, who first doubted that case, and agree that where a settlement has express and particular language, we cannot resort to the apprehension of parties to explain it; but *Cook v. Booth* had express covenants which, in their language, imported a perpetual renewal. Those covenants, which according to the plain sense of

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(a) *Cowp.* 819.

words on the face of the deed itself, did express, or might be construed to express, a perpetual renewal, could not receive explanation *aliunde*; namely, by the construction which the persons executing special leases, and their lessors, had put upon it by more qualified covenants, exclusive of that which went to a further renewal; but the cases that have been cited by my learned brother *Park*, on the present occasion, have put that out of the question. Those cases are perfectly distinct from the present, for reasons which I will not repeat. Having said thus much, I simply confine myself to declaring, that I think the judgment of the Court below is perfectly correct, and ought to be affirmed; but before I conclude, I must give an answer to what has been thrown out in argument. I understand that it was said, the case below wanted authority, because it was decided when two Judges were absent; but I deny that. The question on which we are now deciding, was not determined without great pains and attention; to prove which it is quite enough, to refer to what was said upon the occasion, and to the observations made by Lord *Ellenborough* in the course of the argument; and we all know that no man could take greater pains than he did to form a correct opinion, and that he was confirmed in that by his brother Judge. Under these circumstances, therefore, I am of opinion, that this judgment ought to be affirmed.

Lord Chief Baron RICHARDS.—However painful it may be to me to differ from some of my learned brothers, and whatever consolation I may derive from concurring with the others, I know it is my duty to form my judgment without reference to either feeling. The question here is, whether there be a due execution of the power to lease, in a settlement made upon the marriage of Lord *Vernon* with *Louisa Barbara Mansel*? If the

1819.  
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 DOE  
 d. JERSEY  
 v.  
 SMITH.

1819.  
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 DOB
 d. JERSEY
 v.
 SMITH.

lease is according to the power, there is an end of the question; if it is not, then it is void. The sole question, then, is, whether the lease is void or not? And if it be void, (I beg leave to introduce this, to get rid of a very strong argument of a very learned person), there is an end of the application of the statute of the 4 *Geo. 2.*, for that only operates on leasings and lettings in force, so that we must come back, notwithstanding that statute, and notwithstanding the proceedings in Equity (with which we here have nothing to do), to the real question, whether this attempted execution of the power to lease has been a due execution of it? Now it is remarkable that perhaps there can hardly be said to be any uninfected decision on the subject. With respect to the enlargement of the time, I do not know any decision. With respect to the introduction of the other words concerning the distress, there are the conflicting cases of *Hotley v. Scott* (a) on the one hand, and of *Coxe v. Day* (b) on the other: so that, in the present stage of the doctrine upon this subject, it becomes extremely important, as it seems to me, to consider this case with great care: and I shall make no apology, if I obtrude upon the Court by stating again the situation of the parties to this settlement, and the provisions made by it. I believe it is now perfectly established, that the only thing to be attended to in the construction of powers of this description, or any other power, is to ascertain the intention of the party creating it. The party who creates the power, is the legislator in the particular case; he may impose whatever terms he pleases, provided those terms are not inconsistent with any rule of law. It is not the province of Judges, as it seems to me, to inquire whether the requisitions are reasonable or unreasonable, provided they are expressed,

(a) *Luff*, 316.—(b) 13 *East*, 118.

and not inconsistent with any rule of law; but it is their duty to execute that intention whatever it may be, if it be not opposed to any rule of law. In order to gather the intention of the parties, it becomes absolutely necessary (at least in my view of the case), to trouble the Court with some consideration of the situation of the parties, who made this settlement, and also of the instrument itself. Miss *Mansel* may be considered as having the absolute dominion over this property, which belonged to her father, who gave it to her for life, with a power of appointment. She married a gentleman, who afterwards became Lord *Vernon*, when she appointed the estates, which were entirely hers, to the use of Lord *Vernon* for life, remainder to herself for life, remainder to the children of the marriage, then to such persons as she should by will appoint (not by deed), with remainder, or reversion rather, to herself and her own right heirs: so that, with the exception that she interposes an estate to Lord *Vernon* for life, with a power of leasing, she reserves to herself, and to her own disposition, the entire dominion over the estate. The deed of settlement contains three several powers of leasing adapted to three distinct parcels of the estate, and those powers are to be executed by Lord *Vernon* and herself respectively, when in possession. Thus, Lord *Vernon* became tenant for life of the estates in question, with powers of leasing according to the terms of the settlement, whatever they are, and it is according to those powers that he does affect to lease the estates, which all moved from Miss *Mansel*. I observe on this, because a distinction has been often taken in Courts of Justice, in the exposition of leasing powers, between those which are to be executed by the creator of the power, from whom the estate originally moved, and those which are to be executed by a lessor to whom the estate did not originally belong. It has been some-

1819.

 DOE
 d. JERSEY
 v.
 SMITH.

1819.
Doe
d. JERSEY
v.
SMITH.

times supposed, that less latitude ought to be allowed in the construction of a power in the latter case than in the former, but it is not my intention to discuss that distinction, or consider whether it is well founded or not. It is material, however, to advert to each of these three powers, before we can enter into the validity of the lease, which now presents itself for our consideration. I shall first take that which respects the mines: that power is expressed to be, to lease any part of the premises wherein there is any mine open or to be opened, for any term of years not exceeding thirty-one years, to take effect in possession, and not in reversion, so as upon every such lease there be reserved and made payable, during the continuance of such lease, such share of the ore, or such yearly rent or income as can be reasonably had or obtained for the same: this is all which is said of the rent, and no power of re-entry is required. The second power applies to another portion of the lands: *namely*, to lease for any number of years absolute, not exceeding twenty-one years, to take effect in possession, and not in reversion, reserving the best and most improved rents; as is said before with respect to the leases of mines, and "so as there be contained in every such lease a power of re-entry, in case the rent or rents thereupon to be reserved be behind, or unpaid, by the space of twenty-eight days, after the times thereby respectively appointed for payment thereof." The first limitation of the power has no reservation of re-entry for the non-payment of the rent at any particular time; but here, there is a clause of re-entry to be reserved, provided the rent be unpaid twenty-eight days after the day reserved for the payment thereof. The settlor has declared the law on the subject; and it seems to me, that if the rent should remain unpaid beyond the twenty-eight days, the lessor or other reversioner would be entitled to enter, and that the lessor and lessee could not introduce any other terms more fa-

vourable to the lessee, or to the tenant for life being the lessor, because whatever is most favourable to the lessee is equally so to the lessor. The reversioner is as much a purchaser of his reversion, as the lessor is of his interest, and the reversioner is to be favoured at least equally with the lessee, who is no stranger to the title which he takes, but must be presumed to have knowledge of the title of the lessor under whom he is taking, and into which it is competent for him to inquire. The reversioner is as much a purchaser as the lessee, though he acquires his estate by being named in the deed to which he is no party, by the creator of the power, and so is a stranger to the title, which he has no opportunity to examine. In both these instances there is to be no fine, premium, or foregift, so that the lessor is to have no other benefit against the reversioner in these two cases, than the advantage of securing a tenant for a given number of years, rather than for his own life, for which period he might grant a lease without any power at all: a lease for a given number of years may be more beneficial to him than a lease for life. The next, and only remaining power, the construction of which is submitted to us, is quite different; that is, a power to lease such parts of the estates as were at the time of the settlement leased for life or lives, to any person or persons in possession or reversion, for one, two, or three lives, and so as in every such lease there be reserved the ancient and accustomed yearly rents, duties, and services, or more, or as great or beneficial rents, or as just proportion of such ancient, or the present reserved rents, and so as there be contained in every such lease a power of re-entry for the non-payment of the rent thereby to be reserved. This, clearly, is a power of leasing, under which, the lessor, the tenant for life, has a right to take as great a fine, premium, or foregift, as he can obtain, which is a privilege necessarily, in many instances, to

1819
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 DOX  
 d. JERSEY  
 v.  
 SMITH.

1819.  
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 Doe
 d. JERSEY
 v.
 SMITH.

the disadvantage of the reversioner; because, if the term be not out until after the death of the tenant for life, the reversioner has nothing but the accustomed rent, and, therefore, it cannot be matter of surprise, if, in laying out the property among the objects of her attention, Miss *Mansel* should protect the reversioner, who may be her child, or her appointee, and therefore will still be an object of her attention, by requiring more restrictions and protections than in the other cases; for this is in fact a question between the tenant for life and the reversioner. The lessee has a right to cover himself by the covenant of the lessor, and will be entitled to recover a compensation from his assets, in case of any breach of his covenant; so that the lessee is really protected, and the reversioner is injured, if the terms are not properly attended to. Now, on the 5th of *September*, 1803, Lord *Vernon* granted the lease, which is the subject of the present action, for ninety-nine years, if three lives should so long endure, at the yearly rent of £2. I do not think it necessary to dwell upon the *quantum* of the rent, for the construction must be the same, whatever that be: if the ancient rent had been £100, the words import the same thing. This rent is reserved payable at *Michaelmas* and *Lady-day* in every year, and this was the ancient and accustomed rent. Then, the lessee covenants to pay the rent, and then, it is provided, that if the rent shall be unpaid by the space of fifteen days, and no sufficient distress on the premises, it shall be lawful for the lessor to enter, and possess the premises free from the lease. The real question is, not whether this clause is agreeable to the words of the power contained in the settlement, as applied to this portion of the property of Lady *Vernon* (for beyond all question it is not conformable to the words of the power), but whether those words are, by some latitude of construction, to be so construed as to warrant the introduction of the ex-

pressions in the proviso? In looking into an instrument, especially an instrument where the intention of the parties is to be learnt, the examination must be conducted carefully, and with reference only to itself, unless it refers to some other instrument, or some extrinsic matters. It has been argued at the bar, that the settlement requires only a power of re-entry, and that that requisition is satisfied by a power being introduced into the lease. That *a power* has been introduced into the lease, and from thence it is to be inferred, that the words used are a due execution and a sufficient attention to that power; or, in other words, that from thence we may safely conclude that any power in the lease would suffice, if it suited the taste of the person who is to judge of it, appears to me contrary at once to Reason and to Law. Who, I ask, is to judge of it? Is it a Judge or a Jury? Surely it will not be said, that the tenant for life is to determine: it cannot be supposed that the creator of this settlement, who gave a power to lease in these words, or in any words ever used in a power to lease, meant that the tenant for life should lease as he pleased; if so, he might lease the whole fee out. There must be, therefore, some decision upon the power, either by a Judge or a Jury, but certainly not by the person who is to execute the power. For my own part, I confess I do not feel the weight of the argument relative to the article *a* and *the*. The word *the power*, which might have been put in instead of *a power*, would have been absurd or not more useful or expressive than the word *a*: the meaning must have been the same, whether the settlement had required *a power*, or *the power* of re-entry. To consider, then, the real subject of contest. The words of the settlement are, "and so as there be contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved." The

1819.
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 DOE
 d. JERSEY
 v.
 SMITH.

1819.
DOE
d. JERSEY
v.
SMITH.

objection to the lease is divided into two parts; *first*, that the power of re-entry is not given on the non-payment of the rent, but at an enlarged period, *namely*, fifteen days; and, *secondly*, it is said, the reversioner cannot enter, if there be a sufficient distress on the premises. If either of these objections prevail, it is fatal to the title of the plaintiff; and I will not now form any decisive judgment, (if my judgment could be decisive), whether an enlargement of the time would be fatal to this lease. It seems to me, that the words of the power are plain and specific. If the ancient rent was to be reserved, payable at the usual times, and necessarily on a given day; and if, on non-payment at that day, there is to be a power of re-entry, it must be allowed, that the power to lease must be observed in a lease intended to be made pursuant to that power; but how can a power to re-enter at *Michaelmas* be consistent with a power to enter fifteen days after? The rent is reserved at *Michaelmas*; it is not, therefore, consistent with that reservation, that the lessor should not enter till fifteen days after the rent becomes due. If the power be, that on non-payment of rent, the lessor shall re-enter, it is not consistent with the power to say he shall not enter for fifteen days. It is so far derogatory from the reversioner's right to re-enter, and, therefore, as it seems to me, in substance not within the power. Then, as to the argument, that a hardship is thrown upon the lessee and that it is unreasonable, I must deprecate and protest against any consideration upon that point. The Judges are to expound an instrument on their best judgment, without reference to the hardship on the one side, or the other: any other than to construe the doubt; but what hardship can be stated, which does not belong to both parties? for the reversioner is as much entitled to complain, if he has not the property according to the intention of Lady

1819.
DOE
d. JERSEY
v.
SMITH.

Vernon, as the lessee has, if he mistake the title to his lease; but, with this difference, that he has his remedy against Lord *Vernon's* estate. With respect to the consideration of the deed, without reference to the parties, there is no more hardship on the tenant to pay at *Michaelmas* or any other day. Except the advantage of holding the rent is reserved one day, where is the difference whether there are fifteen days allowed or not? if he stipulates to pay at *Michaelmas*, he knows the time as accurately as he would if it were fifteen days afterwards, and it is as convenient to pay at three as at fifteen days after. Upon the objection with respect to the enlargement of the time, I should certainly have great difficulties, before I could aver, that, in my opinion, the lessor has executed the power of leasing as it is prescribed. I cannot entertain any doubt, except that which I feel from the difference of opinion expressed by learned men; because this is a power of re-entry, in case the rent is in arrear for fifteen days, and no sufficient distress on the premises. The provision throws on the reversioner a difficulty, in my opinion, inconsistent with the power to lease. Under the power to lease, there can be no doubt, that if the rent was unpaid on the day on which it was reserved, or take it fifteen days after, that the right of re-entry was given, and intended to be given; and, beyond all doubt, it was given with great propriety, for it will be the fault of the lessee, if he suffer his rent to run in arrear: he may pay it in due time; but, if he neglect to do so, is he to be allowed, by a contract between himself and the tenant for life, who claims adversely to the reversioner, to throw upon the reversioner the charge of employing persons to examine the premises for distrainable property, and the risk of losing his ejectment by it? We cannot forget the many inconveniences pointed out by the plain-

1819.
DOE
d. JERSEY
v.
SMITH.

tiff's counsel (a) in the course of his argument, as to whether a distress might be made when the corn is growing just above the surface of the earth, and we cannot but feel these difficulties. I confess, it seems to me to be a monstrous proposition, that a person, who has not the authority given him by his right to lease, may impose these terms in operation of the reversion, which are extremely inconvenient, and very injurious to the interest of the reversioner. Let us next look to the other parts of the settlement. With respect to a great part of the estate, the power of re-entry is prescribed in a different form from that before us. I do not know that this weighs much. Am I not to understand, by the other parts of the deed, that when Lady *Vernon* fixed the right of re-entry for twenty-eight days after the rent became due, and when she gave the lessee no day after the rent became due, she meant that the rent should be paid at the time fixed? In one case she gives twenty-eight days, and in the other, no day whatever is given. One word more as to the power immediately under consideration. The lease of the manors, &c., and, indeed, of the manorial lands, must be in possession, and not in reversion: the lease under the power before us may be in possession or in reversion. Now I beg the particular attention of the Court to the distinction here: how can the sufficiency or insufficiency of distress exist on a lease in reversion? What distress can be made on a tenant, who is not in possession, and has no right to possession for twenty years to come? and can it be imagined, that it was the intention of the donor of this power to lease, to give another power, adding to it the terms, "you shall not enter if there is a sufficient distress," when there can be no distress? Perhaps it may be said, that

(a) *Mr. Littledale.*

the right of re-entry is given when the lessee is not in possession: it is so, but the lessor has a right, in consequence of the non-payment of rent, to re-enter when the lessee comes into possession. The distress, as applied to this lease, is perfect nonsense, and I think it must shew, that if the parties knew what they were writing, they could not intend to insert the qualification of the want of sufficient distress in a lease in reversion: if the donor had so expressed it in the power, it might have been inserted in the lease. Here, it is said to be a reasonable construction of the power to lease, that a man should not put an end to it, unless it be in the case of no sufficient distress. It seems to me, that to apply that qualification of want of sufficient distress to such a case as this, is to break in very much upon any intention of the parties; of which I can form no idea. In this particular instance, the lease was in possession, but that does not at all alter the construction of the power as to leases in reversion. I throw this out, as a circumstance, amongst others, which guides us to the intent of the parties, and shews it to be impossible, that the settlor could have relied on the power of distress as a remedy for securing the rent, or on any other remedy, except the power of re-entry, during such time as the estate continued in reversion. In the way, in which it is proposed to apply this power, the parties are supposed to have intended to enlarge the right of the lessee. All must allow, that a right of re-entry was intended, if the rent was not paid, but if there be a sufficient distress, then the right of re-entry may be prevented during the whole residue of the term; so that the tenant for life who has received the fine, premium, or foregift of £2000 (by way of example), is to have the benefit against the reversioner, to the end of the term, because the Judges of the land have decided, that this clause shall be inserted as a reasonable clause, which is directly,

1819.
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 Doe  
 d. JERSEY  
 v.  
 SMITH.

1819.  
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 DOE
 d. JERSEY
 v.
 SMITH.

as it seems to me, in contradiction of the intention of the settlor of the estate, because it would prevent a re-entry, which beyond all doubt was intended to operate at some time, if the rent was unpaid. Under these circumstances, it does seem to me, that the settlor could not have intended that any re-entry, except a re-entry *instante*, on the non-payment of the rent, should be sufficient, and that the judgment of the Court below is erroneous. With respect to the other question, whether the prior leases were properly received in evidence, I shall merely refer to the case of *Baynham v. Guy's Hospital* (a), and those cited by my Brother *Park*: they are cases with which my Brother *Graham* and myself have been long acquainted: they have been acted on with great truth and justice; and I think they have settled, that the former leases cannot be read, to shew what was the intention of the party. With respect to *Coxe v. Day* (b), it is very important; and I cannot help remarking, that when that case was sent for the opinion of the Court of *King's Bench*, it was by the direction of a very able Judge, Sir *William Grant*; and I must also observe, that if *Holley v. Scott* (b) is to be considered as a decision by which we are to abide, it is very singular, that that learned Judge should send the former case to the Court with the same identical question. It is quite clear, that, in the estimation of the learned person who then sat on that bench, and the counsel, there was no decision upon the subject; and the Judges of the Court of *King's Bench* all concurred in stopping the plaintiff's counsel in his reply, and in expressing their opinion, that that lease was void, as not being conformable to the power; and that certainly is, according to my knowledge, the

(a) 3 *Ves. Jun.* 298.—(b) 13 *East*, 118.—(c) *Lofft*, 316.

last case upon the subject. I, therefore, concur with my learned Brothers, Mr. Justice *Park*, and Mr. Justice *Barrough*.

1819.
DOE
d. JERSEY
v.
SMITH.

Lord Chief Justice DALLAS.—This case has been repeatedly argued at the bar, and most ably in each instance; and the subject has been exhausted in observation and authority. It now appears, that, not only the two Courts differ in opinion, but, that there is a difference also between the learned Judges this day present; and the question, whatever the result may be, must, therefore, be considered as one of considerable doubt and difficulty. The principles, which apply to cases of this description, are not in dispute, and the leading rule has been already stated in the course of this day. No intent can be implied against that which is plainly expressed; but, if there be a doubt upon the words, the construction must be reasonable, and according to the intent of the parties, as it is to be collected from the whole instrument, comparing the different parts with each other; and, I say, from the instrument, because, if from this, a clear intent can be collected, a Court is not at liberty to go out of it, or engraft upon it what may appear to itself to be reasonable: for this would be not to construe, but to make a deed for the party, and the question is, not what the power ought to have been, but what it is. The power in question relates to leases of different descriptions, to leases determinable on lives, on which the ancient rents are to be reserved, and to leases for years, at the best or most improved rent. The former were to contain a proviso for re-entry generally for non-payment of rent, the latter were to contain a proviso for re-entry, twenty-eight days after the rent should be in arrear, and the present case is of the first description. It is objected, that the clause of re-entry

1819.
~
DOE
d. JERSEY
v.
SMITH.

varies from that directed by the power in two respects: *first*, by making the right of re-entry to arise not upon the non-payment of rent generally, but fifteen days after such non-payment; and *secondly*, by giving it only in case there shall be no sufficient distress found on the premises, or any part thereof. I shall examine each of these objections separately. And, first, as to the fifteen days. The power is silent in this respect, directing a right of re-entry on non-payment of rent, and saying nothing more. It has not been contended, that if the lease had followed the power, and there had been no mention of time, the clause for re-entry would have been uncertain; or, taking it to be sufficiently certain, that the right would not have accrued on the rent becoming in arrear; nor has it been argued, that such would not have been a good execution of the power. It is clear, therefore, that the words added, produce an effect different from that which would have followed, if the words of the power had been pursued: and, that the effect is to convert a present into a future right. In the case, therefore, of the death of the tenant for life, the right of the remainder-man to re-enter for non-payment of rent, would be postponed for fifteen days beyond the time, when it would have arisen, if the words of the power had been followed. *Coke Littleton (a)* has been this day referred to in support of the lease; but I understand it differently: for the distinction is taken between a right to re-enter generally on non-payment of rent, and a right to re-enter after a specified time, which, in the latter case, it is said, must depend on the time specified in the condition, and is, therefore, various, being matter of agreement in each case between the parties; thus excluding the notion, that there is such

(a) Sec. 325. 201. a.

a thing as reasonable time abstractedly considered. It is to be considered, then, on what grounds the proviso in this case can be said to be a due execution of the power; and the first ground stated is this: it is said, that as the power directed a proviso for re-entry on non-payment of rent generally, and without specification as to time, it must be intended, that a reasonable right of re-entry was intended, and that the time given is a reasonable time. But to this I cannot agree; it is an intendment against express words, and words of clear and definite meaning, for the right of re-entry is to accrue on non-payment of rent; and the time, when a right is to attach, is as well specified by the occurrence of an event, as if time itself were expressly mentioned, and here the event is specified; namely, the non-payment of rent. It is, however, said, that the intention of the party is to be considered; and that it is unreasonable to suppose that he could have meant a provision of such harshness, as, that a tenant should be ejected, the very moment his rent was in arrear; but the intention of the party is only to be considered, as it is to be collected from the instrument itself, and on the instrument so considered, I can entertain no doubt what the party meant, because he has, to my understanding, made use of plain and sensible words. But, supposing it to be a provision of harshness, though this would be fair to urge, if the words of the power were doubtful, and I agree, therefore, it is fairly urged by those who so consider them, yet, if the words be sufficiently clear, we are not at liberty to enter into the consideration of harshness, and still less, to set up whatever our notion of harshness may be, to justify a departure from the power. What the power orders to be done must be done, for this one reason of itself sufficient, that it does so order. It is next urged, that looking to other provisions in the same deed, and applying them to the question of intention,

1819.
 }
 Doe
 d. JERSEY
 v.
 SMITH.

1819.
 {
 DOE
 d. JERSEY
 v.
 SMITH.

the power must be taken to intend, what the party executing it has in effect done; and that when twenty-eight days are expressly ordered to be given in the case of leases for years, in which the rent would be of real value, can it be supposed, it is asked, that in the case of a rent merely nominal, a right for immediate entry would be intentionally prescribed? Comparing, therefore, the two cases, it is said, the proviso was intended to give time in each instance, and that the reason would be stronger for postponing the right of re-entry in the former, and making it immediate in the latter instance. But here again, protesting against departing from plain words, and supposing myself at liberty to consider what the intention was, on what ground am I to infer, that it was intended to give fifteen days for payment of rent, in a case in which the power says nothing of the kind, because, in another case, and of a different description, time is given, when, it is said, there was less reason for giving it? On all legitimate grounds of construction I feel myself bound to reason differently. If the party distinguishes for himself, I am not at liberty to destroy the distinction: nothing being said as to time in the one case, and time being given in another, proves at least that time was under consideration; and even, if, in the case of a single proviso, a reasonable time from the generality of the power could be implied, I should say, emphatically, that in this case, it cannot be implied, because the second provision, if to operate at all, throws light upon the first, and shews that when time was intended to be given it is so expressed. Thus the case appears to me on principle; but *Jones d. Cooper v. Verney* (a) has been cited, as shewing that where the power directs generally a clause for re-entry, a reasonable time may be implied, although the power is silent in this respect.

(a) *Willes*, 169.

All, however, that case proves, is, that it was done in that particular instance without objection; but, what the decision would have been, if the objection had been made then, as it is now, we can only conjecture one way or the other, as we think that it ought now to succeed or fail. It leaves the question, therefore, as a question altogether new, this being the only case referred to; and on principle I am at a loss to understand, how it can be taken as universally true, that when a power prescribes a proviso for re-entry on non-payment of rent, but is silent as to time, the power, because it is silent, must be taken to speak. And what is reasonable time? Is it to be treated as matter of fact, or matter of law? Is it for a Jury, in the first instance, or for the Judge? How is it to be ascertained what time is reasonable? On looking through the reported cases, in which it occurs as matter of express condition, we shall find it different in almost every different case: it is so here; as to one set of leases fifteen days are given, in the other twenty-eight; shall I say it is reasonable in the former, and unreasonable in the latter, or what measure am I to take? In the cases in the books, it is sometimes fifteen days, sometimes twenty, sometimes forty-two, sometimes sixty, in short, mere matter of convention, and, therefore, peculiar to each. Will any of these cases furnish the rule, if not, to what other cases are we to look, or where is the line to be drawn? These are difficulties which press forcibly on my mind. It is said, however, that the party to execute the power is to judge what is reasonable, and so he may in the first instance, if directed so to do, but if otherwise, I should scarcely think it ought to be so left. But, be it so, the difficulty remains the same; for, on a question arising between him and the remainder-man, who is to decide but a Jury or the Court? The same difficulty occurs as to amount. Is it to apply to two pounds, five pounds,

1819.
 {
 DOE
 d. JERSEY
 v.
 SMITH.

1819.
DOR
d. JERSEY
v.
SMITH.

or any, and if so, what sum? The difficulty in drawing a line as to time applies also to rent. These are objections to which I cannot easily find an answer. On the other hand, the line seems plain and direct; when parties have spoken for themselves, let Courts abide by what they have said: but when words are clear, to seek in a doubtful construction for an uncertain intent, to get rid of what may appear harsh, will only lead to litigation, conjecture, vexation, and ruinous expense; in a word, to all which this case has already manifested, and will more fully display, before it shall have attained its close. We are told, however, that if this objection were now to prevail, it would invalidate a great number of leases granted under powers in this kingdom. The fact may possibly be so, and this consideration demands caution. I wish, therefore, to avoid deciding expressly on this ground, whatever may be my view of the subject, as there is another, which, taken singly, is decisive to found the opinion I form. And this brings me to the remaining objection, *namely*, that part of the power which relates to there being no sufficient distress on the premises. And here again, the ground taken is only an extension of the former: it is a wider stride of the same exceptionable sort. All the former observations apply, therefore, with increased force, and I shall content myself with referring to them. It will scarcely be said, after the case to which we have been referred, of *Rees d. Powell v. King (a)*, in which there was such a proviso in the lease, and the party was nonsuited, for not proving that he had searched every part of the premises, a single cottage remaining unsearched, that such a clause is of indifferent or immaterial operation. On what ground then is it now sought to be justified? First, it is said, that it does no more than the law would do without it,

(a) *Forrest*, 19.

and that, therefore, by analogy, it is reasonable: but to this I answer, then leave it to the law: if by law, the party will be on the same footing, in effect, without these words, as with them, why introduce them? It is said, however, that a clause of re-entry for rent in arrear is considered as in the nature of a mere security for rent; that, supposing entry to have been made, still, if not submitted to, an ejectment must be brought, and then, that by the statute, on payment of the arrears of rent, and all the costs, the proceedings would be staid, and thus the right to re-enter be destroyed. To this it is added, that, by the same statute, the landlord must prove, that there was no sufficient distress on the premises, so that the law itself subjects him to the necessity of searching for a distress, before his right to re-enter can avail. And this is true, applied to a proceeding under the statute, and if a party shall elect not to re-enter under his right, but shall avail himself of the statute, in obtaining the benefit, he must take upon himself the burthen, and prove, because the law upon which he proceeds says he must prove, that there was not a sufficient distress. But if he choose to stand upon his stipulated right, and take the chance of all the difficulties which may attend demand and re-entry at Common Law as applied to such right, he is not bound to distrain, and in this respect he may choose for himself. On the other hand, the tenant may get rid of the right to re-enter, by paying up the arrears of rent with costs, but he may not do this, or he may not be able to do it, and, in either case, the landlord succeeds without having been bound to search for a distress, and, where he stipulates not to be so bound, it is competent to him so to do: so it would be under the statute in the case of a valid lease, but, here, the question is upon the validity of the lease itself, which depends upon a due execution of the power; though, I admit, the argument is only urged

1819.

 DOE
 d. JERSEY
 v.
 SMITH.

1819.
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 DOR  
 d. JERSEY  
 v.  
 SMITH.

to shew, from a supposed analogy, that the proviso in question is not inconsistent with a due execution of the power. But this doctrine was equally resorted to in the case of *Coxe v. Day* (a). It was said, "inasmuch as the tenant coming in and paying the arrears and costs would be relieved, such a clause is now become merely a clause *in terrorem*." But Lord *Ellenborough*, interrupting the counsel, observed, "surely the direct power of re-entry is more beneficial to the landlord, and the very statute itself shews the difference." The case of *Holley v. Scott* (b) has however been referred to, as an authority in favour of this part of the case, and obscurely as we have it reported, and the particular point not being at all adverted to in the decision, still as the decision must have been different, if the objection now made had been deemed a valid objection, I think it in fairness may be taken to be so: as far as we can trace what it was, it was a decision in favour of a power similar to the present. But giving all the weight that can belong to this case in point of authority, still, as a single case, and a case so imperfectly reported, and so militating, as it seems to me, (and I speak it with deference) against first principles, I should not feel disposed to subscribe to it, even if it were not opposed by any other decision, but which I conceive it to be by *Coxe v. Day*, on which so much has been already observed, that I shall not feel it necessary to dwell long. It is in point, unless the present case can be distinguished from it on the grounds on which a distinction has been endeavoured to be raised: I shall therefore examine whether these grounds are sufficient so to distinguish it. And, first, it is said, that in the case of *Coxe v. Day*, the Court had only to construe a power prescribing a right

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(a) 13 *East*, 118.—(b) *Lofft*, 316.

of re-entry as applicable to a particular lease; but, that, in this case, it is a question of intention to be determined on a comparison of distinct provisions; and, that, from such comparison, the conclusion results, that the power must have intended the proviso in question to be such as it is found in the lease. I will not repeat what I have already said in this respect: I deny that there is any ambiguity, or any generality, to give discretion or call for implication, or intendment, and even comparing the separate provisions with a view to get at intention, if intention were doubtful on the precise words, the reasons become stronger in my view of them, against adding the words in question. The next ground resorted to is the former leases, which, it is contended, are admissible evidence, and which leases contain a proviso precisely similar to the present, as applied to the property in question. It seems scarcely necessary to say, for it follows as a consequence from all I have hitherto observed, that, in my opinion, these leases are not admissible. Where no uncertainty results from generality, and where nothing is left deficient in point of expression, where there is no reference to any matter *dehors* the instrument itself, recourse cannot be had to foreign matter; and I think no uncertainty or ambiguity belongs to the instrument in question, nor are there any words of reference to connect it with any other whatever in this respect. But not so in other respects; for, as to the rent, where former leases are intended to govern, they are expressly referred to, and it is said "*the ancient rent*," that is, the rent now reserved by subsisting leases shall be the rent under this present power. So, as to the power given to let leases of mines; they are directed to have the proper and usual covenants, such as are usually inserted in similar leases: but, as to the proviso for re-entry on non-pay-

1819.  
~  
DOE  
d. JERSEY  
v.  
SMITH.

1819.  
~  
Doe  
d. JERSEY  
v.  
SMITH.

ment of rent, there is no reference to any other lease, nor any words making it necessary to refer to any matter, extrinsic to the instrument. But, for the purpose of argument, take the leases as admitted, how do they remove the difficulty? Because in former leases not referred to, or even pointed at, there is a provision of a particular description, shewing that when a right of re-entry was intended to be subjected to the want of a sufficient distress, it is so expressed; Does it follow, that in a subsequent lease the same thing is, therefore, to be implied when not expressed? Even supposing the former leases to have been made under a similar power, still, it would only shift the question from this lease to those, or, taking it that the parties, by acquiescing in such leases, have put by their own acts a construction upon their own words, it will only fall within the rule, that what is matter of legal construction cannot receive a different construction from the conduct of the parties concerned. The leases, if let in, would with me leave the difficulty where it was, proceeding on what I deem grounds of legitimate reasoning; but it is enough to say, that for the reasons already given, I hold them to be inadmissible. Even if, looking out of the instrument, I should conjecture that the maker of the power did so intend, and would have so said, if his attention had been drawn to the subject, it would not be a conjecture on which I should feel myself at liberty to act; but to this case, as to many that have gone before, and many that in all probability will follow, the important principle must be applied, that the intent is to be the rule of construction, if the words will bear it out; but if the force of the words be such, that the intent cannot be complied with, the rule of law must take place, and the words prevail. A single observation on the case of *Coxe v. Day*. I admit it must be taken, that in the

opinion of the Court below, that case and the present are dissimilar: but, as I cannot distinguish them on the grounds on which the decision proceeded there, or the argument has been rested here, the distinction, to my judgment, fails altogether; and *Coxe v. Day* itself, being considered by me as properly decided, becomes with me an authority in point. On the only remaining ground, *namely*, the general clause for re-entry in the concluding part of the lease, having delivered my opinion so fully on the other points, and deeming this less material, and more particularly so, as no reliance has been put upon it, in the course of the several opinions delivered this day, I shall content myself with referring to what has already been said. The result is, that the judgment of the Court of *King's Bench* must be

Reversed.

1819.  
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 Dox
 d. JERSEY
 v.
 SMITH.

MORRELL, demandant, ALBAN, tenant, HATCHETT,
 vouchee.

Monday,
 May 24.

MR. Serjt. *Heywood*, on a former day in this term, moved that the warrant of attorney in this recovery might be amended, by substituting the name of the demandant for that of the tenant in the body of the warrant, or that it might pass by striking out the name of the tenant, and leaving a blank for the same, with a voucher of the vouchee alone. The *præcipe* engrossed at the head of the warrant of attorney was, "Command *William Yeates Alban* that justly, &c. and without delay, he render to *Jeremiah Fludger Morrell, &c.*" which was right. The warrant of attorney was as follows: "*Shropshire*, to wit.—*Thomas Bulkeley Hatchett*, whom the said *W. Y. Alban* vouches to warrant, appoints in his stead *J. B.* and *J. M.* gentlemen, his attornies, jointly and severally, against the said *W. Y.*

If the name of a tenant be inserted by mistake for that of the demandant in the body of a warrant of attorney in a recovery, the Court will not allow the warrant of attorney to be amended, or the recovery to pass, although the parties were rightly described in the *præcipe* at the head of such warrant.

1819.
 MORRELL,
 Demandant.

Alban, to gain or lose in a plea of land." The learned serjeant contended, that as the parties were rightly described in the *præcipe*, the recovery might, at all events, pass: and he referred to the case of *Forster*, demandant, *Forster*, tenant, *Bolton*, vouchee (*a*), where the Court permitted a recovery to pass, when it no otherwise appeared in what plea of land the warrant of attorney was given than by reference to the *præcipe* recited at the head. He therefore submitted, that the name of the tenant in the body of the warrant itself might be considered as surplusage.

The Court, however, expressed their dissent;—upon which, the Secondary stated, that it had long been the practice of the Court to amend warrants of attorney, and that many applications similar to the present had been constantly granted;—when they allowed it to be mentioned again on a subsequent day.

Mr. Serjt. *Heywood* then submitted that this warrant of attorney might be amended; and he drew a distinction between recoveries and adverse suits. That, at all events, the same amendments might be allowed in the former as were made in the latter after error brought. This was only a misprision of the clerk in the warrant of attorney, and is a mere matter of form. The statute 8 *Hen. 6*, c. 12, s. 2, empowers the judges of the respective Courts, in which any warrant of attorney for the time shall be, to examine the same, and amend any misprision of the clerks in such warrant, so that by such misprision no judgment shall be reversed or annulled. [Mr. Justice *Burrough*.—That statute only applies to misprisions by the clerk; here, it was the act of the party, and signed by him.] Since that statute passed till the case of *Fox*, demandant, *Benbow*, tenant, Earl

(a) 6. *Taunt.* 378.

Gower, vouchee (a), there was no difficulty whatever in amending warrants of attorney. When a warrant of attorney is enrolled, it becomes a record of the Court, and may be amended according to the statute of Hen. 6. In the *Dutch East India Company v. Henriques* (b), a warrant of attorney was amended by making it debt instead of case. That was by the act of the party. So in *Brookes' Abridgment* (c) a warrant of attorney in *formdon* was put by the tenant against the demandant, in a plea of *scire facias*, and amended. In *Hiley v. Riggs* (d), a bill was exhibited in the name of the defendant, purporting to be by *John K.*, his attorney, and the warrant of attorney constituted *William K.* On this being assigned for error, the Judges caused it to be amended, and affirmed the judgment. So in *Hilliard v. Redner* (e), in debt by an *executor*, on error being assigned for the want of a sufficient warrant of attorney, it appeared that there was a warrant of attorney for the plaintiff in the suit without naming his executor as it should have done; but it was held to be amendable, there being no other action depending between the parties. There amendments were allowed in cases of adverse proceedings. In *Pind v. Norton* (f), a common recovery was suffered to the intent, to bar an entail against *Elizabeth*, and the warrant of attorney expressed that *Alicia* puts in her stead *A. B.* against the defendant, whereas her name was *Elizabeth*, and it was assigned for error that no warrant of attorney was entered on record for *Elizabeth*, and the question was whether this were error or should be amendable or not, and it appears that it was amended. There the amendment was

1819.

MORRELL,
Demandant.

(a) 2 *Marsh*, 328. S. C. 6 *Taunt.* 652.—(b) 2 *Cas. Prac. C. P.* 44.—(c) *Amendment Pl.* 36.—(d) *Moore*, 711.—(e) *Cro. Jac.* 135. S. C. *Jenkins*, 316.—(f) *Dyer*, 105.

1819.

 MORRELL,
 Demandant.

allowed after writ of error; surely therefore it may be done in this case, which is still *in fieri*. From that case, which was decided in the reign of *Philip* and *Mary*, no difficulty arose in allowing amendments in warrants of attorney, until the year 1816, and innumerable instances of such amendments are to be found in cases previous to that year. In the cases of *Shaw*, demandant, *Le Blanc*, tenant, *Ramsay*, vouchee (a), and in *O'Brien*, vouchee (b), warrants of attorney were allowed to be amended without any difficulty being raised. When a recovery is sought to be amended, all the proceedings therein are included. The warrant of attorney therefore may be amended, although it be not expressly mentioned to the Court, and then no difficulty would arise. In *James*, demandant, *Williams*, tenant, *James*, vouchee (c), the Court allowed the *præcipe* of a warrant of attorney to be amended which affected the operation of the whole instrument, because the amendment was not in the same suit.

Lord Chief Justice DALLAS.—The only question now is, whether we are to overturn the rule laid down by this Court in the case of *Fox*, demandant, *Benbow*, tenant, *Earl Gower*, vouchee. It has been uniformly held, that no amendment can be allowed to alter the deed of a party, and on that ground Lord Chief Justice *Gibbs* in that case said (d), “that the Court would not give a different effect to the warrant of attorney from that which the parties had produced; that if the effect would not be altered by the amendment, there was no necessity to require it, and that therefore they would not depart from the general rule. That as to suffering the recovery to pass without the amendment there was

(a) 4 *Taunt.* 98.—(b) 4 *Taunt.* 196.—(c) 1 *Moore*, 130. S. C. 7 *Taunt.* 434.—(d) 2 *Marsh.* 328.

no ground to justify such a step, because the warrant of attorney ought to specify with precision the cause in which the party was to appear." But it is now said, that amendments of this description have always been allowed till that rule was laid down; and that the officer may now do so if the whole of the recovery be sought to be amended, without confining the application to the warrant of attorney alone. We will therefore look into the authorities on the subject.

1819.
MORRELL,
Demandant.

Cur. Adv. Vult.

On this day Lord Chief Justice DALLAS delivered the following judgment. The Court having fully considered the rule laid down in the case of *Fox*, demandant, *Benson*, tenant, *Earl Gower*, vouchee (a), are of opinion that there is no reason to depart from it as it was there established, that a warrant of attorney in a recovery could not be permitted to be amended. But as it has been stated that it has been since allowed in the case of *James*, demandant, *Williams*, tenant, *James*, vouchee (b), it appears to be quite the reverse, for that case is corroborative of the former, as the amendment was there allowed in the *præcipe* * of the warrant, on the express ground that it was not an integral part of the instrument. We are therefore of opinion that this amendment must be

Refused.

Mr. Serjt. *Heywood* then applied to waive his motion for the amendment, and submitted that the recovery might be permitted to pass on the warrant of attor-

(a) 2 *Marsh.* 328. S. C. 6 *Taunt.* 652 *pro* 632.—
(b) 1 *Moore*, 130. S. C. 7 *Taunt.* 434.

* In the report of that case the amendment prayed for is stated, by mistake, to have been in the *caption* instead of the *præcipe*.

1819.

MORRELL,
Demandant.

ney as it now stood, as was done in the case of *Forster*, demandant, *Forster*, tenant, *Bolton*, vouchee (a). But

The Court held, that this would in substance have the same effect as amending the instrument, and that this application therefore would fall within the rule laid down in *Fox v. Benbow*. That another recovery might be suffered, by which the defect might be cured, and that they would not permit it to pass as it now stood, and more particularly so, as parties had lately become extremely careless in preparing instruments of this nature.

The learned Serjeant therefore took nothing by his motion.

(a) 6 Taunt. 373.

Monday,
May 24.

WILLIAMS v. BOSANQUET and others.

Covenant for non-payment of rent lies against an assignee of a lease, to whom an assignment is made by way of mortgage security, although he has never entered or taken actual possession.

THIS was an action of covenant. The declaration stated, that on the 1st of *November*, 1808, by an indenture made between the plaintiff of the one part, and one *William Marsham* of the other part, the plaintiff demised to *Marsham* certain lands and tenements, To hold the same to *Marsham*, his executors, administrators, and assigns, from the 29th of *September* then last past, for the term of eleven years wanting twenty-one days from thence next ensuing, yielding and paying to the plaintiff the yearly rent of £ 150 clear from all taxes, &c. payable quarterly, on the four usual days of payment, by even and equal portions. That *Marsham* covenanted for himself, his heirs, executors, administrators, and assigns, to pay the rent during the term clear of all deductions:

By virtue of which indenture *Marsham* entered and became possessed of the premises for the term so to him granted. That after the making of that indenture, and during the term, to wit, on the 20th of *June*, 1812, all the estate, right, title, and interest of *Marsham* to the premises, by assignment thereof made, legally came to and vested in the defendants, who thereupon entered and became possessed thereof. The plaintiff then averred a general performance on his part, and assigned for breach that, on the 24th of *June*, 1813, £150, for one year's rent of the premises, became and was due, and still was in arrear and unpaid to the plaintiff, contrary to the tenor and effect of the indenture and covenant of *Marsham* so made for himself and his assigns. And that so the defendants had refused to keep that covenant.

The defendants pleaded, That all the estate, right, title, interest, term and terms of years then to come and unexpired, property, profit, claim, and demand whatsoever of *Marsham*, of, in, and to the premises by assignment thereof legally made, did not come to and vest in the defendants in manner alleged by the plaintiff in his declaration. On this plea issue was joined.

At the trial of the cause before the late Lord Chief Justice *Gibbs*, at *Westminster*, at the sittings after *Michaelmas* term, 1814, a special verdict was found, which stated in substance, That after the making of the indenture in the declaration mentioned, and before the expiration of the term thereby demised, to wit, on the 18th of *July* 1812, by a certain other indenture made between *Marsham* of the one part, one *Beachcroft*, since deceased, and the defendants, of the other part, under the hand and seal of, and duly executed by *Marsham*, reciting an indenture of lease of the 1st of *September*, 1807, and made be-

1819.
 WILLIAMS
 v.
 BOSANQUET.

1819.
WILLIAMS
v.
BOSANQUET.

tween one *Henry Thompson* of the one part, and *Marsham* of the other part, whereby *Thompson* demised to *Marsham* a certain messuage and lands, for a term, and at the rent, and subject to the covenants therein mentioned: and also reciting the indenture of lease in the declaration mentioned; and also reciting a bond, dated the 2d of *March*, 1810, whereby *Marsham* became bound (together with one *Thomas Marsham*) to one of the defendants and *Beachcroft*, since deceased, in the penalty of £3000 conditioned for the payment of £1500 with interest; and also reciting another bond, dated the 17th *June*, 1811, whereby *Marsham* and *Thomas Marsham* became bound to all the defendants and *Beachcroft* in the penalty of £2000 conditioned for the payment of £1000 with interest; and also reciting that there was then due from *Marsham* to the defendants and *Beachcroft* £2500, and that for the farther and better securing the re-payment thereof with interest, *Marsham* had agreed with the defendants and *Beachcroft*, to assign and transfer to them; the said in part-recited indenture of lease, and all the said messuage, lands, and hereditaments, and all *Marsham's* estate, right, and interest in the said recited leases. It was by the said indenture of the 18th of *July*, 1812, witnessed to the tenor and effect following:—that in consideration of the said sum of £2500 due and owing upon the bonds of both the *Marshams* to the defendants and *Beachcroft*, and of five shillings paid by them to *Marsham*, he thereby bargained, sold, assigned, transferred, and set over to the defendants and *Beachcroft*, their executors, administrators, and assigns, as well the said in part recited indentures of lease, as all the premises thereby demised to *Marsham*, his executors, administrators, or assigns, and also all the estate, right, title, interest, term and terms of years then to come and unexpired, trust, property, be-

nefit, claim, and demand whatsoever, both at Law and in Equity, of him *Marsham*, his executors, administrators, or assigns, of, in, to, or out of the premises: To hold the same to the defendants and *Beachcroft*, their executors, administrators, and assigns, from thenceforth for all the rest, residue, and remainder of the term then to come and unexpired of and in the same, in as large, ample, and beneficial a manner, and to all intents and purposes as *Marsham*, his executors, administrators, and assigns could have held or enjoyed the same, together with the said indentures of lease, subject to the rents and covenants reserved by the said indentures of lease, and also subject to the proviso and agreement for the redemption of the same premises as thereafter mentioned. Provided always, that if *Marsham* should pay to the defendants and *Beachcroft* £2500 with lawful interest for the same, on the 18th of *July* then next ensuing, without any deduction, that then the defendants and *Beachcroft* should, upon the request and costs of *Marsham*, his executors, administrators, and assigns, re-convey and re-assign the premises to him, his executors, administrators, or assigns. And *Marsham* did thereby, for himself, his heirs, executors, and administrators, covenant with the defendants and *Beachcroft* to pay them the said sum of £2500 with interest. And farther that the lease was a good and valid lease unforfeited and unsurrendered, and not made void or voidable by any act or deed whatsoever, and that he, *Marsham*, was lawfully possessed of, or entitled to the premises for the residue of the term; subject to the rents and covenants reserved, and that he had in himself full power and authority to assign and set over the premises for the residue of the term; and that in case he should happen to make default in the payment of the £2500 and interest, it should be lawful for the defendants and *Beachcroft* peaceably and quietly to enter into and have, hold,

1819.

WILLIAMS
v.
BOBANQUET.

1819.
WILLIAMS
v.
BOSANQUET

use, occupy, possess, and enjoy the premises to their own use for the residue of the term, and of such farther estate and interest as *Marsham* had therein, without any let or hindrance by him or any person claiming under him, free and clear of all charges and incumbrances done or committed by him or any other persons whomsoever. And *Marsham* then covenanted to make and execute such further conveyances and assurances as should be reasonably required in default of payment of the £2500; and it was lastly agreed that until such default, it should be lawful for *Marsham* to occupy the premises, and take the rents thereof without any interruption or disturbance by the defendants and *Beachcroft*.

The special verdict then stated that the last mentioned indenture of assignment, immediately after the execution thereof by *Marsham*, was delivered to the defendants and *Beachcroft*, who accepted the same. That at the time of the execution thereof by *Marsham* he was indebted to the defendants and *Beachcroft* as therein mentioned, and that he did not pay them the £2500 with interest, as specified in the last mentioned indenture, at such time and place, and in such manner as therein was appointed, but made default in such payment, and that the same remained unsatisfied at the time of the commencement of this suit. That the defendants and *Beachcroft* have not, nor hath any or either of them, at any time actually entered into, or become in fact possessed of, the demised premises. But whether, upon the whole matter found by the special verdict, all the estate, right, title, interest, term of years then to come and unexpired, property, profit, claim, and demand whatsoever, of *Marsham* in the demised premises, by assignment thereof legally made, did come to and vest in the defendants and *Beachcroft*, the Jury were entirely ignorant, and therefore prayed the advice and consideration of the Court. That if it should appear

that it did, they found for the plaintiff; if not, for the defendants.

1819.

WILLIAMS

v.

BOSANQUET.

This special verdict was argued at *Serjeants' Inn Hall*, in the last *Hilary Term*, before ten Judges (Mr. Justice *Best* and Mr. Justice *Richardson* being absent) by Mr. Serjeant *Vaughan* for the plaintiff, and Mr. Serjeant *Bosanquet* for the defendants.

Mr. Serjeant *Vaughan*, for the plaintiff, submitted that the estate in question legally came to, and vested in the defendants by assignment. The sole question is, whether an assignee of a lease, to whom an assignment is made by way of mortgage security, but who never either actually enters or takes possession, can in fact be deemed liable to the covenant for the payment of rent? Considering how common such securities are, it is singular that this should now be made a *verata questio*. Is it because long terms are unknown to the common law? Lord *Coke* says (a), that "by the ancient law a man could not have made a lease above forty years at the most, for then it was said that by long leases many were prejudiced and many disherited." Mr. Justice *Blackstone* (b) makes the same observation, but both he and Lord *Coke* add that this law was antiquated. It appears by *Madox's Formulæ Anglicanum* (c) that several instances of leases for a longer term than forty years, as early as the reign of *Richard* the second, were granted, and are there referred to. Until the statute 21 *Hen. 8. c. 15.* (d) it was in the power of a lessor, after he had granted a term, to defeat it by suffering a recovery, and the lessee could not falsify such recovery

(a) *Co. Litt. 45. b. 46 a.*—(b) 2 *Bl. Com. 142.*—
 (c) *No. 239, fol. 140. 21 Rich. 2. demise for 80 years. Ib. No. 245, fol. 146, for the like term. A. D. 1429. Ib. No. 248, fol. 148, for 50 years, 7 Edw. 4.*—(d) *Co. Litt. 46. a.*

1819.
WILLIAMS
v.
BOSANQUET.

though fraudulently suffered; but that statute enacted that feigned recoveries should not avail against the tenants of the freehold. The statute of *Gloucester* indeed gave a partial relief, by allowing the lessee to be received to plead and try whether the recovery was obtained by collusion; in which case the execution of the judgment in the recovery was suspended until after the term ended. The question, however, in this case depends on the legal effect of an instrument of assignment. An assignment alone, if made with the assent of the assignee, and accepted by him alone, creates such a privity of estate that, *eo instanti*, on its execution he becomes liable to the covenants of the lessee, and this, whether the assignment be absolute, or conditional by way of mortgage, for no sound distinction can be drawn between the two. The primary relation of the lessor and lessee must be considered. The position laid down by Mr. Justice *Blackstone* (a) with respect to estates less than freehold is too broad; he supposes actual entry to be the essence of the contract, and that without it, a bare lease vests no estate in the lessee, but only gives him a mere naked right of entry, which right, he says, is called his interest in the term, or *interesse termini*. So that it seems, actual entry is the only mode by which the acceptance of a grant can legally be manifested. But there are other modes, as by a person's becoming an executing party to a lease or other instrument, or by delivery and acceptance of a deed. Any act which manifests the assent of the party is sufficient to create a tenancy, except for the purpose of bringing an action of trespass, which cannot be maintained before actual entry. It is true that acceptance is essential to a grant, otherwise it might be a burthen to the party instead of a benefit, and so neither the crown nor a cor-

(a) 2 Bl. Com. 144.

poration can compel a person to take a grant *in invitum*. It has been said that a release which must enure with and enlarge an estate, cannot work without a possession joined with an estate (a). But after a lease, and before entry, the release of the lessor cannot enlarge the estate, but merely extinguishes the rent, in respect of the privity between the parties (b). When a lease is executed, the lessor parts with his estate, so when it is accepted by the lessee, he has a certain interest: and if the lessor die immediately after execution, that does not avoid the lease; nor is the interest of the lessee affected by death, for if there be two lessees, and one die, the interest of the other shall survive (c). The interest of a lessee after lease executed, is barrable by fine (d). After lease executed, the rights of a lessee are so far perfected as to make them grantable to another or descendible to his executor,—*Saffyn v. Adams* (e). There is a wide distinction between *interesse termini* in cases where a lessee takes an immediate or future interest; and in *Coke Littleton* (f) it is said that *interesse* is vulgarly taken for a term or chattel real, and more particularly for a future term, in which case it is said, in pleading, that he is possessed *de interesse termini*, but *ex vi termini*, in legal understanding, extends to estates that a man hath in or out of lands, for he is truly said to have an interest in them. Again, in the same book, it is farther said (g), that if a man make a lease for years, the lessee before he enters has an estate for years, which he may grant; this position is extremely different from that laid down by Mr. Justice *Blackstone*. It cannot therefore be understood that the lessee hath a naked right, for then he could not grant it over; but as he had an *interesse termini* before entry he might grant

1819.

WILLIAMS

v.

BOSANQUET.

(a) *Shep. Touchst.* 321.—(b) *Co. Litt.* 270. a.—
(c) *Ibid.* 46. b. *Litt.* s. 66. *Co. Litt.* 51. b.—(d) *Saffyn's Case*, 5 *Rep.* 124. b.—(e) *Cro. Jac.* 61.—(f) 345. b.
—(g) 270. b.

1819.
 WILLIAMS
 v.
 BOSANQUET.

his interest over, although for want of an actual possession he be not capable of a release to enlarge his estate; the main distinction is between actual and legal possession, so there is a similar distinction between *interesse termini* when the interest is immediate or future. In *Shepard's Touchstone* (a) it is said that a lease for one thousand years is perfect by the delivery of the deed without any livery of seisin, or actual possession; the interest therefore completely passes as between the lessor and lessee on the execution of the lease; whatever interest therefore passes to the lessee before entry passes to his assignee in like manner on the execution of the assignment; the nature of the assignment imports, *ex vi termini*, a transfer of all the lessee's interest, and the assignee is subject to all the rents and covenants contained in the lease, not a scintilla of interest is reserved, and the only difference is, that the privity of estate alone, and not the privity of contract, is transferred; but when once the transfer has taken place *terra transit cum onere*, and there is a complete adoption by the assignee of all the covenants running with the land; an assignee may bring an action of ejectment (b), or he may have a writ of *quare ejecit infra terminum* (c). Supposing that an assignee takes as large an interest as the lessee, it necessarily follows that he would be equally liable by privity of estate: the only difference is between privity of contract and privity of estate; and it is quite clear that if the assignment were absolute, the assignee to all intents and purposes would be liable. The judgment of Lord Mansfield, in the case of *Eaton v. Jaques* (d), proceeded on the distinction between an absolute and conditional assignment; and although Mr. Justice Buller in that

(a) 211.—(b) *Fitzherbert's Natura Brevium*, 198, D.
 —(c) *Com. Dig. Tit. quare ejec. inf. ter. (A.)*—(d) *Doug.*
 455.

1819.

 WILLIAMS
 v.
 BOSANQUET.

case held (a) that the assignee would not be liable without possession, even if the assignment were absolute; yet that is wholly inconsistent with the doctrine laid down, that an assignee may maintain an action of ejectment. [Lord Chief Justice *Abbott*.—In *Comyn's Digest*, it is said that an assignee may have a writ of *quare ejecit infra terminum*, but it was there necessary for the assignee to enter and seal a lease on the land before he could bring his action, and in so doing he perfected his estate.] No distinction can be drawn between this case and that of *Eaton v. Jaques*; they are both relative to mortgage securities; here, there is nothing to do with equitable claims, the whole of the estate vests by mortgage as well as any other security; and the legal estate in condition is in the mortgagee. Lord *Mansfield*, in *Eaton v. Jaques*, said that the instrument was not an absolute conveyance, but a mere security; and though Mr. Justice *Buller* there held, that even if the assignment were absolute, covenant would not be maintainable against the assignee, yet that doctrine cannot be supported by any of the authorities cited in the case. The subsequent case of *Walker v. Reeves* (b) is wholly irreconcilable with that of *Eaton v. Jaques*, and the Court must now make an election between the two. In *Cook v. Harris* (c) the form of pleading is material to shew that the acceptance of an assignment is equivalent to actual entry; it was an action of debt for rent against the defendant as assignee of a term, being executor of the first lessee; the defendant pleaded that before the rent became due she assigned all her estate, interest, and term to J. S. and that the assignee accepted it. In the previous cases it had always been averred that the assignee entered and became possessed; the replication in that case was


(a) *Doug.* 461.—(b) *Doug.* 461. n.—(c) 1 *Lord Raymond*, 367.

1819.
 WILLIAMS
 v.
 BOSANQUET.

that the defendant assigned over to defraud the plaintiff. The rejoinder traversed the fraud, and upon demurrer, exception was taken to the plea, because it did not aver that the assignment by the defendant was made after the assignment declared upon, and that it might be consistent with the plea, that the estate might be re-assigned to the defendant. And Lord Chief Justice *Holt* there said (a), "this plea ought to have said *post assignationem*; and that if the plaintiff had not replied it would have been ill, but that the plaintiff, by replying fraud, had cured the objection." He also observed, that the ancient method of pleading assignments was, *virtute cuius* the assignee entered and was possessed, but that it was then disused, for the assignee had the estate in him before entry, though not to bring trespass. [Mr. Baron *Wood*.—In *Huckle v. Wye* (b), which was an action of covenant against J. S. as assignee of W. R., the declaration only set forth that the tenements came to the defendant by assignments *virtute quarum*, &c, and therefore held ill, for it should have set forth that the defendant was assignee of the term of J. S.] The case of *Cook v. Harris* shews that an averment of the acceptance of an assignment was sufficient, and that it was not necessary to aver *virtute cuius*, the assignee entered and became possessed. An assignee becomes possessed in law by force of the assignment; and *virtute cuius* is not traversable, but is a mere inference of law; *Priddle v. Napper* (c). *Willion v. Berkley* (d). *Beale v. Simpson* (e). If *virtute cuius* be traversable, the effect of the statute of uses is equally so. The case of *Walker v. Reeves* was decided after *Eaton v. Jaques*, and the question there was, whether *virtute cuius* was traversable or not; and Lord *Mansfield* held that by the assignment the title and pos-

(a) 1 Lord Raymond, 367.—(b) Carth. 256.—(c) 11
 Esp. 10.—(d) Plowden, 231.—(e) 1 Lord Raymond, 412.

sessory right passed, and the assignee became possessed in law. [Mr. Justice *Bayley*.—The case of *Walker v. Reeves* has been impeached by that of *Turner v. Richardson (a)*.] In that latter case the question of actual entry was not touched on by the Court, and the case of *Copeland v. Stephens (b)* is consistent with that of *Walker v. Reeves*, for that case decides that a general assignment of a bankrupt's estate does not vest the term in his assignees without an assent and acceptance by them. Mr. Justice *Lawrence*, in *Turner v. Richardson*, said (c) that "some assent of the defendants to the assignment of the premises to them was necessary, in order to charge them with the bankrupt's covenants, and that the only question was, whether there were any evidence of such assent." There is a wide distinction between assignees in law and in fact; the assignees of a bankrupt are merely assignees in law, and need not take a possession of the bankrupt's estate unless they assent so to do. The cases of *Eaton v. Jaques* and *Walker v. Reeves* were cited in *Jackson v. Vernon (d)*, to show that a mortgagee of lands out of possession is not entitled to rent reserved in a beneficial lease, nor answerable for the contracts of the mortgagor. Lord *Kenyon* there dissented from the doctrine laid down in the case of *Eaton v. Jaques*, and in *Westerdell v. Dale (e)*, his Lordship observed, "It has been said, in one of the cases, that a mortgagee is only liable when in possession, and that what proves this point is, that in charging the mortgagee it is necessary to state in pleading that he entered and was possessed; but, with great deference to the learned Judge who gave that reason, I doubt it. I consider those as mere formal words." The case of *Stone v.*

1619.

 WILLIAMS
 v.
 BOSANQUET,

(a) 7 *East*, 335.—(b) 1 *Barn. and Ald.* 593.—(c) 7 *East*, 344.—(d) 1 *H. Bl.* 114.—(e) 7 *Term Rep.* 312.


1819.
 ~~~~~  
 WILLIAMS  
 v.  
 BOSANQUET.

*Boans* (a) was decided by Lord *Kenyon* on the same grounds, and proof was there offered that no possession had been taken, and his Lordship said, whether it were taken or not made no difference; and when *Eaton v. Jaques* was there cited, his Lordship added, he would overrule it without the least reluctance. [Mr. Justice *Burrough* read a manuscript note of that case, and observed that what Lord *Kenyon* really said was, that by an assignment of the whole estate all liabilities accrued, and that persons who act with caution always take a mortgage for a term one day short of the original lease.] There are a number of cases in equity, which shew that those Courts consider the legal effect and operation of an assignment in law, is to render the assignees liable to all the covenants contained in the lease. In *Sparkes v. Smith* (b) the Court said it was the mortgagee's folly to take an assignment of the whole term, whereby to subject himself to the covenants in the original lease, and not to take a derivative lease as he might have done. So in *Pilkington v. Shaller* (c) it was held that if the plaintiff, a mortgagee, had taken only a derivative lease, he could not have been liable to the rent reserved on the first; and although Lord *Mansfield*, in *Eaton v. Jaques*, considered those cases as questionable, and unable to stand the test of inquiry, yet the principle is clear, that if an assignee take an assignment of the whole of the term, he is liable to all the covenants contained in the original lease. In *Lucas v. Comerford* (d), Lord *Thurlow* acted on those cases; there the lease was deposited as a security, and his Lordship said, "whether it was taken as a purchase or a pledge with the defendant was immaterial, and that he could not be compelled to take the

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(a) *Woodfall's Landlord and Tenant*, 5th Edit. page 81. —  
 (b) 2 Vern. 276. — (c) *Ibid.* 374. — (d) 1 Ves. Jun. 235.

estate without the burden;" and he obliged the person with whom the lease was deposited to execute and take the assignment. It is clear, therefore, that it has never been doubted in equity, that if an assignee take to the possession he is liable in point of law. As the cases of *Eaton v. Jaques*, and *Walker v. Reeves*, are not to be reconciled, and as this is a mere inference of law, the plaintiff is entitled to recover, for the lessee having parted with his interest to the assignee, although the latter cannot maintain trespass, yet he may be considered as being sufficiently in possession for all other purposes.

1819.  
  
 WILLIAMS  
 v.  
 BOSANQUET.

Mr. Serjeant *Bosanquet* for the defendants.—The case of *Eaton v. Jaques* governs this in every point: it is therefore necessary for the plaintiff to shew that it has been overruled, or that the grounds on which it was decided were either contrary to or not sanctioned by the Common Law; according to the principles of which that decision was perfectly correct. This is an action of covenant brought against the defendants as assignees, and founded on a privity of estate; and it must be admitted that *qui sentit commodum debet et onus sentire*; but that principle does not apply unless the party have the whole advantage. At an early period, it was laid down that debt was maintainable against an assignee if he had an entire interest in the term, but not against one who took less than that. Whether long terms of years were known or not to the Common Law is quite immaterial, for here the term was only eleven years. In *5 Hen. 7 (a)* it was established that an assignee of the entire interest in a term was liable: the only question in this case therefore is, whether all the lessee's right,

1819.  
 WILLIAMS  
 v.  
 BOSANQUET.

title, and interest, legally vested in him, and duly came to the defendants by assignment. [Lord Chief Justice *Abbott*.—If all the legal estate vested in him, it is sufficient; it is therefore unnecessary to consider the equitable rights of another, for that will not alter the case.] But here all the legal estate must be vested in the assignee, and that claim alone, and not the equitable, is the only point in issue. An assignee can be only chargeable in respect of the benefit which he may derive from the estate. All this depends on the assignment by the lessee, the assignee merely stands in his place, but the lessor's original contract is with the lessee alone. The form of declaring, adopted in the 35th of *Elizabeth* (a) was, that the lessee being so possessed, &c. granted and assigned all his estate, title, interest, and term of years which he then had in the premises, and not merely a claim and demand. Where a lease for years is granted to an immediate lessee, although he may become liable, still his assignee cannot be answerable till entry, for the transfer of rights in modern times, has always taken place under the statute of uses; and by the operation of that statute it cannot apply to the assignee, because a tenant for years has no seisin of the freehold to serve the use. This case, therefore, must be considered as it stands at Common Law, by which no estates either in land, freehold, or chattel, vest before actual entry. Estates in land lie either in livery or in grant; those which lie in livery will not pass by grant alone, nor, on the other hand, will those which lie in grant pass by livery, or without deed. A rent charge lies in a grant, and passes by grant only; and if the deed by which such charge is created be destroyed by cancellation, the rent charge falls to the ground (b); but if an estate for

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(a) *Brown's Entries*, 132.—(b) *Co. Litt.* 308. b.

years passes by deed in livery, and not in grant, such estate is not destroyed by cancelling the deed. Since the statute of frauds, it has become necessary that all conveyances of land should be in writing; but before that statute was passed, though estates for years were created by deed, yet they passed and were assignable by parol: and in *Noke v. Awdler* (a) it was held that an assignee by parol, might maintain an action of covenant; it is quite clear, therefore, that estates for years lie in livery only, and not in grant. *Bracton* (b) lays down this rule, which clearly shews that leases for years do not lie in grant, for he says, "*Donationum secundum quod predictum est alia perfecta, alia imperfecta, nunquam erit perfecta donatio, donec donatorius plenam habueret possessionem sive seisinam*; possession therefore will not do alone with respect to freehold, but there must be also a livery of seisin, yet in cases of chattel interest the rule is different, for *et donec sibi tradita res fuerit, quia traditionibus et usu captionibus possessiones, et rerum dominia transferuntur*. In *Bacon's Abridgment* (c), which is a high authority, the title relative to leases having been written by Lord Chief Baron *Gilbert*, it is pointed out in what cases an entry by the lessee was requisite to the perfection of his lease, and as to this, it was there observed, that "at Common Law no lease for years, whether it were with or without any reservation of rent, was looked upon to be complete till an actual entry by the lessee; for that, though the lessor had done all on his part to perfect the contract, yet, that till there was a transmutation of the possession by the actual entry of the lessee, it wanted the chief mark of his consent thereto; and, therefore, if a

1819.

WILLIAMS

v.

BOSANQUET.

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(a) *Cro. Eliz.* 373. *S. C.* 436.—(b) *Book 2. c. 17. s. 1.*  
 —(c) *Tit. Leases, M.*

1819.  
 WILLIAMS  
 v.  
 BOSANQUET.

lessor released to the lessee before entry, the reversion would not pass, because the lessee had not possession." It has, however, been now said, that possession is a mere conclusion of law resulting from the deed; but this is denied by the authorities of *Coke*, *Bracton*, and Lord Chief Baron *Gilbert*; for they all declare that a possession by deed is not sufficient, that the execution of leases by entry was necessary till the statute of uses, which statute introduced another mode of reducing uses into possession. So in *Bacon's Abridgment* (a), it is said, that "If one make a lease for years, to begin two years hence, and after the two years expire, before any entry, and whilst the lessor continues still in possession, the lessee may grant over his term and interest to another, because his *interesse termini* was not divested, but continued in him as it was at first granted; and in the same manner he transfers it over to another, who by his entry might reduce it into possession whenever he thought fit." *Littleton* (b) says, that "tenant for term of years, is, where a man letteth lands and tenements to another for term of certain years, after the number of years that is accorded between the lessor and lessee; and that when the lessee enters by force of the lease, then he is tenant for term of years;" and Lord *Coke's* Commentary on this section (c) is, "and true it is that to many purposes he is not tenant for years until he enter, as a release made to him is not good to him, to increase his estate before entry, but he may release the rent reserved before entry in respect of the privity; neither can the lessor grant away the reversion by the name of the reversion before entry, but the lessee before entry hath an interest, *interesse termini* grantable to another." So *Littleton* (d) says, that "if a man letteth lands to another for a term

(a) *Tit. Leases, P.*—(b) *Sec. 58.*—(c) 46. b.—  
 (d) *Sec. 66.*

of years, although the lessor dieth before the lessee enter into the tenements, yet he may enter into the same tenements after the death of the lessor, because the lessee, by force of the lease, hath right presently to have the tenements according to the form of the lease." This section was cited and recognised by Lord *Ellenborough* in the judgment of the Court of *King's Bench* in *Copeland v. Stephens* (a). *Littleton* (b) again says, that "if a man letteth to another his land for term of years, if the lessor release to the lessee all his right, &c. before the entry by the lessee, such release is void, for that the lessee had not possession in the land at the time of the release, but only a right to have the same by force of the lease;" but Lord *Coke's* Commentary on that section (c) is particularly strong, for he says, "the lessee before entry hath but an *interesse termini*," which is perfectly consistent with the proposition laid down by Mr. Justice *Blackstone* (d), who says, "that in leases for years, an actual entry is necessary to vest the estate in the lessee, for the bare lease gives him only a right to enter, which is called *interesse termini*, and that when he enters in pursuance of that right, he is then, and not before, in possession of his term, and complete tenant for years." So Lord *Ellenborough*, in *Copeland v. Stephens*, uses expressions to denote an *interesse termini*, or future interest, which principles are not only applicable to, but must govern this case: his Lordship there says, (e) "the right in the land, and the right to have the land, although they may be capable of grant or assignment, are matters distinct from the estate in the land, and the action of covenant against the assignee of a lease is founded on privity of estate, and not upon privity of right, if there

1819.  
 WILLIAMS  
 v.  
 BOSANQUET.

(a) 1 Barn. & Ald. 607.—(b) Sec. 459.—(c) 270. a.  
 —(d) 2 Black. Com. 314.—(e) 1 Barn. and Ald. 607.

1819.  
 WILLIAMS  
 v.  
 BOBANQUET.

be any such thing." [Lord Chief Justice *Abbott*.—The judgment of the Court in that case is so cautiously worded that it cannot affect the present question, neither was it intended by the Court so to do; the sections cited by his Lordship from *Littleton*, as to entry, were merely referred to by way of analogy.] Although some other act denoting assent may be equivalent to entry, and although on a freehold interest, livery of seisin be dispensed with, yet in one instance an entry is absolutely necessary before the estate be perfected, viz. in the case of an *exchange*; for *Littleton* lays it down (a), that "if there be two persons each seised of land, and the one grant his land to the other, for land which the other hath, each may enter into the others land so put in exchange without any livery of seisin." And Lord *Coke*, in commenting on that section, says (b), that "by the exchange the parties have no freehold, in deed or law, in them before they execute the same by entry." It is therefore quite clear that estates in lands are imperfect till actual entry:—here, there was merely an assignment executed by the original lessee to the defendants; no counter-part of a lease appears to have been executed by them; but it is merely found by the special verdict, that the indenture was delivered to, and accepted by them. All the authorities before the case of *Eaton v. Jaques* (c) shew that possession was necessary to subject an assignee to an action. The averment of entry and possession is as ancient as the doctrine now contended for; but it has been said that this is merely an inference of law, because *virtute cuius* is not traversable; but an allegation of entry is always a matter of fact, not a conclusion of law. [Mr. Justice *Holroyd*.—It is quite clear that an allegation of entry is a matter of fact, and not traversable.] With

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(a) *Sect. 62*.—(b) 50. b.—(c) *Doug. 455*.

respect to the liability of executors; There are several cases which lay down the principle, that an executor, as such, is liable to be sued in respect of the lease of his testator whether he enter or not; and whether the land be of sufficient value or not, he is still liable to the extent of such value, and all the other assets of the testator; yet if he enter, he becomes chargeable as assignee, but not so without entry. In *Buckley v. Pirke* (a) Lord Chief Justice *Parker* said, that "if the executor of a lessee enter, the lessor may charge him as an assignee for the rent incurred after his entry in the *debet* and *detinet*." So in *Billinghurst v. Spearman* (b), Lord Chief Justice *Holt* said, that "in debt for rent, the executor might plead that he had no assets, and that the premises were of less value than the rent. In *Hellier v. Casebert* (c) it is said, "that an executor cannot waive a term, but that he shall be charged upon the *detinet*, upon which the assets shall come in question." These cases, therefore, establish, that if, after taking, he continue in possession, he shall be charged in the *debet* and *detinet* whether he have assets or not. In *Bellasis v. Burbriche* (d) indeed it is said, that "in cases of leases for years, the rent becomes due from the lease, and not from the entry; and the plaintiff has no need to aver occupation, because the lessee is liable to pay the rent whether he occupy or not, it being due by the lease and not by the occupation." But in that case there was a privity of contract between the lessor and lessee, which cannot possibly apply to the case of an assignee. In *Cook v. Harris* (e) the judgment of Lord *Holt*, as referrible to entry, may be considered as extra-judicial, for he founded his conclusions on the pleadings, as there, the de-

1819.  
WILLIAMS  
v.  
BOSANQUET.

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(a) 1 *Salk.* 317.—(b) *Ibid.* 297.—(c) 1 *Lev.* 127.  
—(d) 1 *Lord Raymond*, 171. S. C. 1 *Salk.* 209.—(e) 1 *Lord Raymond*, 367.




1819.  
 WILLIAMS  
 v.  
 BOSANQUET.

defendant was assignee of a term, being also executor of the first lessee, and no question arose as to assets or the liability of the defendant as executor; but his Lordship admitted that the ancient mode of pleading assignments was, *virtute cuius* the assignee entered and was possessed, and said that it was then disused: and he there inferred that the assignee had the estate in him before entry; but Mr. Justice Buller, in the case of *Eaton v. Jaques* (a), said, that "it was merely a *dictum* of Lord Holt, who was clearly mistaken as to the form of pleading, for that he had looked into the precedents, and that they always alleged, *virtute cuius* the assignee entered and was possessed." The course of pleading now, is the same as it was in the reign of *Elizabeth*, and there is no precedent to be found in which that course has been deviated from, nor where an entry has been traversed. In *Huckle v. Wye* (b) it was objected that the declaration was not maintainable, because it merely averred that the tenements came to the defendant by assignment, and that no action was maintainable against an assignee after several mesne assignments, because it might be an assignment of another estate than the term of the original lessee; and that the words *virtute quarum* would not assist the declaration, for that these were only by way of inference, and not traversable; and formed a conclusion, not warranted by the premises,—for the same tenements might come to him by assignment of another estate in them, and not the same estate that the first lessee had. It seems, therefore, that the entry must be by virtue of the deed by which the original term is assigned. [Lord Chief Justice Abbott.—You say that it is necessary to insert the averment in the declaration, that an assignee entered and became possessed, from its general introduction in actions of covenant by the

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(a) 2 Doug. 461.—(b) Carth. 255, 256.

lessor against the assignee, but the same averment is used in the like action between the lessor and lessee; the strength of the inference in the former case is lessened by its general use, and in the latter it is wholly unnecessary.] Still, the defendants rely mainly on the case of *Eaton v. Jaques*, which was decided on sound principles, and which establishes that an assignee is not liable, although the assignment be absolute, unless he be in full possession of the beneficial enjoyment of the whole of the estate. As to the case of *Sparkes v. Smith (a)*, referred to by Lord Mansfield in *Eaton v. Jaques*, it cannot be considered as an authority for the plaintiff; for the Court of Chancery there refused to assist the plaintiff, and therefore his only mode of recovery was by an application to a Court of Common Law. So *Pilkington v. Shaller (b)*, also referred to by Lord Mansfield, is wholly inapplicable to the present question: it is a case wholly unknown to the Common Law; for if a party were entitled at Law, the Chancellor would have no power to interfere; and Lord Mansfield merely said, that that case could not be supported, as it was the mortgagee's fault to take an assignment of the whole term, which was contrary to the practice of a Court of Equity. So in *Lucas v. Comerford (c)*, Lord Thurlow sent the case to a Court of Law, saying, "I will compel the party to take an assignment, and then you may try what you can do at Law;" but his Lordship did not thereby decide that he had any relief at Law. All the decisions in Equity which have been referred to, do not affect the case of *Eaton v. Jaques*. *Stone v. Evans (d)* was decided by Lord Kenyon in 1796, and *Westerdell v. Dale (e)* in 1797. In the former case, according to

1819.  
  
 WILLIAMS  
 v.  
 BOSANQUET.

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(a) 2 Vern. 275.—(b) Ibid. 374.—(c) 1 Ves. Jun. 235.—(d) Woodfall's Landlord and Tenant, 5th edit. 62.—(e) 7 Term Rep. 312.

1819.  
 WILLIAMS  
 v.  
 BOSANQUET.

a manuscript note, Lord *Kenyon* is made to say, that he did not subscribe to the doctrine, that a lessor could not sue the mortgagee as assignee of all the estate of the mortgagor, unless the former had taken actual possession, and that he had merely heard, in the course of conversation, that there had been such a case as *Eaton v. Jaques*. It is material to observe, that the case of *Stone v. Evans* was decided prior to that of *Westerdell v. Dale*; although in *Woodfall's Law of Landlord and Tenant* the former does not appear to have been decided till 1799. [Mr. Justice *Park*.—In *Abbott* on shipping (a), the case of *Stone v. Evans* is mentioned as being applicable to a mortgage of a ship, and it is stated that evidence of possession was given: and that in *Westerdell v. Dale* Lord *Kenyon* had not changed his opinion of *Eaton v. Jaques*.] *Westerdell v. Dale* related to the mortgage of a ship, and Lord *Kenyon* thought there might be a distinction between a mortgage of real and personal property, and also between an assignment by way of mortgage and an absolute assignment: his Lordship therefore might think *Eaton v. Jaques* untenable on that distinction, without adverting to the want of possession; but he merely doubted that case, and added, that it was not necessary to decide whether a mortgagee was only liable when in possession, and therefore avoided giving any positive opinion on it. The true ground of the decision in *Eaton v. Jaques* seems not to be fully understood. By an assignment in bankruptcy, all the property of the bankrupt passes to the assignees; they, by the same assignment, agree to accept the trust, and execute a counterpart of the instrument by which all the chattel interest of the bankrupt vests in them. All the cases, therefore, that have been decided on the bank-

rupt laws, are a very strong confirmation of that of *Eaton v. Jaques*. The assignees become possessed of all the bankrupt's property except leases, which they may either accept or refuse. [Mr. Baron Graham.—The question in these cases is not whether the assignees have entered, but whether they have elected to take the property or not; if they take the profits by others, it amounts to a constructive entry.] In *Turner v. Richardson (a)* Lord *Ellenborough* differed from Lord *Kenyon*, and said that it was necessary in that action to declare that the premises had come to the defendants by assignment, and that by virtue thereof they had entered and become possessed for the residue of the term. The cases of *Wheeler v. Bramah (b)*, and *Bourdillon v. Dalton (c)*, tend to the same point, viz. that assignees of a bankrupt may renounce, unless they have taken possession of the premises; when the property has once been assigned, they cannot select that part which may be beneficial, and reject that which may not be so, except on the ground that they have not taken possession. In *Jackson v. Vernon (d)*, and *Chinnery v. Blackburne (e)*, the Court saw no ground to impeach the authority of *Eaton v. Jaques*; and those cases decided that the assignees were not liable, because the whole of the profits had not been conveyed to them, nor had they taken possession, and therefore that even an absolute assignment without possession would not render an assignee liable; but there is a wide distinction between a mortgage and an absolute assignment. The defendants in this case are not absolute assignees, but in *Eaton v. Jaques* they were so. All the later authorities shew, that until an assignee has

1819.

WILLIAMS

v.

BOSANQUET.

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(a) 7 *East*, 342.—(b) 3 *Camp.* 340.—(c) *Peake's Ni. Pri. Cas.* 238. *S. C.* 1 *Esp. Rep.* 233.—(d) 1 *H. Bl.* 114.—(e) *Id.* 117. n.

1819.

WILLIAMS

v.

BOSANQUET.

taken the whole benefit he shall not be deemed liable; and in cases of bankruptcy an assignee is considered as a trustee for the bankrupt; and where a bankrupt himself is trustee, the bankrupt laws cannot convey to the creditors that property which is not the bankrupt's. By the civil law property is indivisible, for a person cannot renounce one portion and accept the other (a), *vel omnia admittantur, vel omnia repudiantur*.—It follows therefore that this action, which is founded on a privity of estate, and in which, all the estate, interest, and term, must be actually vested in the defendants, cannot be maintained; their estate is not complete until entry; and assignees for the residue of a term cannot be considered as tenants, before such estate is perfected by actual entry,

Mr. Serjt. *Vaughan*, in reply.—It is impossible that the case of *Eaton v. Jaques* can be considered as good law; and the chief object of the present is to investigate the principles on which that case was decided: it has, in fact, been already overruled by several subsequent decisions. Mr. Justice *Blackstone*, in treating of estates less than freehold, although he conceives a livery of seisin to be necessary, still mentions nothing respecting chattel interest; nor has the doctrine in *Bracton* any reference to such interest. The plaintiff here is not bound to shew an actual entry by the defendants, or that they were completely invested; but the only point to be considered is, whether they are liable to the covenants in question? it is not necessary to contend that they could maintain trespass. In *Coke Littleton* (b), it is said, that *interesse termini* is vulgarly taken for a future

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(a) *Domat's Civil Law*, Part 2, book 1, Tit. 1, sec. 1, 12th head. *Digest*, book 29, tit. 2, sections 1 and 2.—(b) 345. a.

term, in which case it is said, that he is possessed *de interesse termini*, but *ex vi termini* extends to estates that a man hath in lands. As to the passage in *Littleton* (a), referring to the case of an exchange, it appears that it may be by parol, and actual entry must therefore be shewn: if it were by deed, it might have furnished an argument for the defendants; but the passage expressly says, that it may be either by parol or grant. It is true that *virtute cuius* is an old averment; but if it be an averment of fact, and not of law, there is no precedent to be found where such an averment has been traversed, except in the case of *Walker v Reeves* (b); but if that averment contained allegation of mere matter of fact, there must have been many other instances where it would have been traversed. In transfer by lease and release, the lessee must have some interest before entry, for by the privity of estate the release will have the effect of extinguishing the rent. The liability of executors is wholly distinguishable from that of the assignees of bankrupts; an executor is liable whether he enter or not, and he is in law the assignee of the testator. [Mr. Justice Bayley.—If he enter, he becomes chargeable as assignee.] But he is liable to the extent of the assets of his testator, whether he enter or not. In *Cook v. Harris* (c) the defendant was declared against as assignee. *Bellasis v. Burbricke* (d) is in favour of the plaintiff: for it determined that for rent due on a lease at will, the plaintiff must shew an occupation, but that on a lease for years he need not set forth any, the rent being due by the lease, and not by the occupation; the liability of a tenant at will, therefore, attaches on his occupation, and of a lessee on his privity of contract. In *Huckle v. Wye* (e) the defendant was declared against as assignee of J. S., *virtute*

1819.  
WILLIAMS  
v.  
BOSANQUET.

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(a) Sec. 62.—(b) 2 Doug. 462. n.—(c) 1 Lord Raymond, 367.—(d) 1 Lord Raymond, 170. S. C. 1 Salk. 209.—(e) Carth. 285.

1819.  
 WILLIAMS  
 v.  
 BOSANQUET.

*cujus* he entered, and it was there held that *virtute cujus* was not traversable, and that it was a mere inference of law. *Sparkes v. Smith* (a) shews that the Court of Equity could not interfere, and by the advice of counsel it was referred to a Court of Common Law, as they there thought the assignee would have been liable. *Pilkington v. Shaller* (b) is still stronger, for there had been a verdict at law regularly obtained. In *Stone v. Evans* there was evidence of the possession being taken; and Lord *Kenyon* doubted whether he had given a precipitate judgment; but when the late Lord Chief Justice *Gibbs*, then counsel in that case, offered to disprove that fact, his Lordship said it would make no difference, and that the circumstance of taking possession was not material; and in *Westerdell v. Dale* (c) he had not altered that opinion; but the principal question in that case turned on the construction of the register acts, and whenever *Eaton v. Jaques* was mentioned to his Lordship, he said the decision of the Court in that case ought not to be referred to. As to the cases cited relative to the liabilities of the assignees of a bankrupt, the decisions in them turned on the peculiar situation of the bankrupt laws. Although in *Auriol v. Mills* (d), a bankrupt was held liable to an action of covenant for non-payment of rent; yet the 49 Geo. 3, c. 121, s. 19, has provided for cases in which leases are accepted by the assignees; but the bankrupt laws are entirely beside the present question, for the assignees must make an election, whether they will take to the property or not; and it is not necessary that they should actually enter into the possession. Now the question here is, does or does not all the estate, interest, and term, vest in the defendants by assignment?

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(a) 2 Vern. 275.—(b) Ibid. 374.—(c) 7 Term Rep. 312.—(d) 1 H. Bl. 433. S. C. (in error.) 4 Term Rep. 94.

1819.  
 WILLIAMS  
 v.  
 BOSANQUET.

It certainly does, for immediately, on the execution of a lease, an assignee may by deed convey the whole of his interest in the estate to another: it is true that an assignee must enter before he can maintain trespass, but he may convey the whole for the purpose of the conveyance; therefore he takes either the whole or nothing. As to the passage cited from *Bacon's Abridgment* (a), it merely establishes that by the simple execution of a lease, a lessee shall not be taken to be in possession, unless he consent thereto. When a lease is executed, all the interest of the lessor passes to the lessee; and when it is accepted by the lessee, the whole of the interest of the former is vested in the latter. If, by such execution and acceptance, the interest of the lessor passes to the lessee, so by an acceptance of an assignment, the interest of the lessee equally passes to his assignee. The averment of actual entry being a mere inference in law, and not an allegation of fact, the plaintiff is most clearly entitled to judgment.

The Judges took time to consider; and on this day Lord Chief Justice DALLAS delivered the following judgment:—

The question which arises on this special verdict is, whether under the facts stated, the defendants took all the estate and interest of the original lessee by his assignment of the whole term of the lease, having taken such assignment as a security for the repayment of a sum of money lent, and the defendants never having actually occupied, or, in fact, become possessed. And first, it will be proper to refer to the nature of such an estate as between the lessor and the lessee.

The definition by *Littleton* (b) is, "Tenant for term of years, is where a man letteth lands or tenements

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(a) *Tit. Leases, M.*—(b) *S. 58. p. 43. b.*



1819.

WILLIAMS  
v.

BOSANQUET.

to another, for a term of years certain, after the number of years that is accorded between the lessor and lessee; and when the lessee entereth by force of the lease, then is he tenant for years," and the latter words have been relied on, as shewing that entry is necessary to constitute a tenant for a term of years, the words being, "and when the lessee entereth by force of the lease, then is he tenant for years." As connected with the 58th Section, the 59th is also to be attended to, which is in these words: "And it is to be understood, that in a lease for years, by deed or without deed, there needs no livery of seisin to be made to the lessee, but he may enter when he will by force of the same lease." In *Littleton* (a) this is still further explained, and it is said, "Also if a man letteth land to another for a term of years, albeit the lessor dieth before the lessee entereth into the tenements, yet he may enter into the same tenements after the death of the lessor, because the lessee, by force of the lease, hath right presently to have the tenements according to the force of the lease;" and "the reason," says Lord Coke, "is, because the interest of the term doth pass and vest in the lessee before entry, and therefore the death of the lessor cannot defeat that which was vested before." But "true it is," he adds, "that for many purposes he is not tenant for years, till he enter: as a release made to him is not good to increase his estate before entry, but he may release the rent reserved before entry in respect of the privity, and the lessee before entry hath an interest, *interesse termini*, grantable to another." In *Littleton* (b), the distinction is taken between an interest in the term and actual possession of the land; and it is said, "If a lessor release to the lessee all his right, &c. before entry, such release is void, for that the lessee had not the land, but

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(a) S. 66.—(b) S. 459.

only a right to have the same land by force of the lease;" and this is explained by Lord *Coke*, in his comment, who says, "A release, which enures by way of enlarging an estate, cannot work without a possession;" but (taking the distinction between the estate, the land, and the interest in the term), he adds, "that a release before entry shall extinguish the rent;" and in further commenting on the words of *Littleton*, that the lessee had only a right to have the land by force of the lease, he says, "this is not to be understood that he hath but a naked right, for then he could not grant it over, but seeing he hath *interesse termini* before entry, he may grant it over, albeit, for want of an actual possession, he is not capable of a release to enlarge his estate." And so, by Lord *Holt*, in *Cook v. Harris* (a), "The assignee hath the estate in him before entry, though not to bring trespass," that being an action founded on possession; but as between lessor and lessee with respect to rent, this reason does not apply, for the right to the rent, and the liability to pay, vest by the lease and not by the occupation.—In *Bellasis v. Burbriche* (b) it is laid down, that in debt for rent upon a lease at will, the plaintiff must shew an occupation, for the rent is only due in respect thereof, and, therefore, it must appear to the Court when the lessee entered and how long he occupied; but in debt for rent on a lease for years, the plaintiff need not set forth any entry or occupation; for, though the defendant neither enters nor occupies, he must pay the rent, it being due by the lease or contract, and not by the occupation. The same case is reported in another book (c), and as concerns the present point, is in these terms. "In cases of leases for years, the rent becomes due by the lease and not from the entry; and there is no need to aver occupation, because the

1816.  
 WILLIAMS  
 V.  
 BOSANQUET.

(a) 1 Lord Raymond, 367.—(b) 1 Salk. 209.—(c) 1 Lord Raymond, 171.

1819.  
WILLIAMS  
v.  
BOSANQUET.

lessee is liable to pay the rent whether he occupy or not; but in cases of leases at will, occupation must be averred. The doctrine in *Coke Littleton*, and the cases to which I have already referred, are in point to shew, that actual possession is not necessary to render the lessee liable under a lease to payment of rent; and this leads to the question, whether there be any difference in this respect between the lessee and his assignee, or, as in this case, between an assignee taking an assignment by way of security for a debt, or taking it absolutely. And, first, in the case of an absolute assignment, it seems difficult, on principle, to understand on what the distinction can rest; for, if, by assignment, the lessee may grant to another all his interest in the term, and by acceptance of such assignment, the assignee take all the interest which the assignor had in the premises; and if the assignor were liable before entry, or without entry, to which the authorities fully go, it seems necessarily to follow that the assignee of the lessee is liable in the same way. But the form of the declaration in such actions has been resorted to, and the allegations of entry and possession, it is said, are to be taken as allegations of fact, not as conclusions of law, and, therefore, shewing entry and possession to be necessary. That those allegations may be matter of fact, or of law, and that this will depend upon the nature of the subject, is not to be denied; but the question is, how are they to be taken in cases like the present. If this question were altogether new, they would constitute allegations of fact with those who think entry necessary;—of law, with those who think possession the legal effect of the assignment; so that it would still come round to the general question, whether actual entry and possession be necessary. But to say that they are necessary, because such is the form of the declaration, is, in effect, to beg the question, as the argument turns in a circle, when it is said, entry and

possession are necessary, because the declaration so alleges,—and because they are necessary, the declaration does so allege. In *Cook v. Harris*, which was an action of debt for rent against the assignee of a term, the declaration contained no averment of entry and possession; and Lord *Holt* there said, “That the ancient method of pleading assignments was, *virtute cujus* the assignee entered and was possessed, but that this method was now disused, for the assignee had the estate in him before entry. But in *Eaton v. Jaques*, this is denied by Mr. Justice *Buller*, who says, Lord *Holt* is mistaken, for that he (Mr. Justice *Buller*) had looked into the precedents, and found that they always alleged *virtute cujus* the assignee entered and was possessed. Be it, therefore, that in this respect Lord *Holt* was mistaken, though the declaration in the case before him contained no such averment, either as to the original lessee, or the assignee of the lessee; still Lord *Holt*’s authority in point of opinion remains precisely the same, *namely*, that such averment is not necessary, being only what the law would imply, opposed certainly by that of Mr. Justice *Buller*; and admitting Mr. Justice *Buller* to have been right as to the fact, that all declarations, before and since that particular case, contained and still contain this allegation, it would equally leave the question unsettled, of which description the allegation is to be considered, whether as matter of fact or matter of law. No case has been cited in which these words have been traversed, and such traverse has been held good; on the contrary, it will immediately be seen the only decided case is the other way. That is the case of *Walker v. Reeves* (a), which was covenant for rent reserved upon a lease, by an assignee of the reversion, against an assignee of

1819.  
  
 WILLIAMS  
 v.  
 BOSANQUET.


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(a) 2 Doug. 452. n.

1819.  
WILLIAMS  
v.  
BOSANQUET.

the original lessee. The defendant pleaded two different pleas. The first was demurred to. In the second, he stated, that before the rent in question became due, he assigned all the estate, title, interest, and term of years, which he then had to come in the premises, to one *Riggs*; by virtue of which assignment *Riggs* entered, and was, and still is possessed thereof, &c. To this plea the plaintiff replied, that, at and after the time when the rent in question became due, the defendant remained and continued in possession of the premises, without this, that the said *Riggs*, at any time before the rent became due and in arrear, entered into the premises, and was possessed thereof. The defendant demurred to this replication, and shewed for cause, that the plaintiff had therein traversed, and attempted to put in issue matter of law only, and not any matter traversable or issuable. The Court, after argument, took time to consider; and Lord *Mansfield* in delivering their opinion said, "That they did not enter into the merits of the first plea, for that they were unanimous in thinking that the replication to the second was not good, unless it had gone farther, and charged the second assignment to have been fraudulent; that by the assignment, the title and possessory right passed, and the assignee became possessed in law;" and his Lordship added, "that that case was by no means like *Eaton v. Jaques*, for the assignment there being a mortgage from the nature of the transaction, it was not an assignment to that purpose, it was a mere security till the mortgagee called for his money; the mortgagor was to be left in possession, and to pay the interest, and it was not understood by either of the parties that the mortgagee should be liable for the rent." Taking it, then, that the assignee is, after acceptance of the assignment, liable without entry and possession, *Eaton v. Jaques* will stand on its own pecu-

liar ground, which is, that an assignment of a lease, taken by way of pledge or security, differs in this respect from an absolute assignment; so that entry and possession are necessary to make the assignee in the former case liable. On the other hand, three cases in Equity have been cited precisely similar to the present. In the case of *Sparkes v. Smith (a)*, the Court of *Chancery* refused, on bill, to compel an assignee of a term on mortgage to discover his assignment; the object of the lessor in requiring it, being, to make the assignee liable to the covenants of the mortgagor, although he had not taken actual possession of the premises; and the Court there said, it was the mortgagee's folly to take an assignment of the whole term, whereby to subject himself to the covenants in the original lease, and not to take a derivative lease of all the term, but a month, week, or a day, as he might have done; yet, inasmuch as he was only mortgagee, who never was in possession, they would not assist the plaintiff to charge him, but left him to recover at law as well as he could. In *Pilkington v. Shaller (b)*, where £100 were lent by way of mortgage upon an assignment of a building lease, and the mortgagee never entered nor took possession, but lost the money lent, the defendant in Equity having recovered against the mortgagee, as assignee, the rent reserved on the lease, the bill was, to be relieved against the recovery at Law; and the Court dismissed it, saying, the mortgagee was ill advised to take an assignment of the whole term. In both these cases, the principle of Law, that an assignee of a whole term is subject to the covenants contained in an original lease, is fully admitted. The different event of the applications arose, therefore, from the parties

1819.  
  
 WILLIAMS  
 v.  
 BOSANQUET.

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(a) 2 Vern. 275. S. C. *Powell on Mortgages*, 1st edit. 78.  
 —(b) 2 Vern. 374. S. C. *Powell*, 79.


1819.  
 WILLIAMS  
 v.  
 BOSANQUET.

having changed sides on the applications to the Court. The third case, *Lucas v. Comerford* (a), was a bill filed by executors of the lessor against the depositary of a lease to secure a debt, for specific performance of a covenant in the lease to rebuild houses. In that case Lord *Thurlow* said, "it was no matter whether the defendant took the lease as a pledge or as a purchase, he could not take the estate without taking the burthen (b)." The case of *Eaton v. Jaques* stands then as a single case, opposed as I have stated; but if there were no authority against it, is it upon principle to be supported? The assignment of a lease for the whole term, whether absolute, or subject to a proviso for re-assignment in a certain event, is, as far as concerns the interest, to be transferred precisely the same; and the assignment, as in the present case, is of all the right, title, and interest of the assignor, in the lease. So completely does the interest pass from the one and vest in the other, that there is a covenant to re-assign when the money shall be repaid.—The whole interest is therefore assigned, and the whole is to be re-assigned. It vests then absolutely, till such re-assignment, in the party who is to re-assign, and is not less absolute, because, by agreement between the immediate parties, to which the lessor is no party, the assignor may in an event, which may or may not happen, entitle himself to a re-conveyance, such as by the money being repaid in the intermediate time; till such re-assignment, the assignee stands in the situation of the assignor, and is, as against the lessor, subject to all the liabilities created by the lease; and if the one were liable without entry and possession, the other is equally so; and that the former would be liable, has I conceive been fully shewn. But in this case, as it seems to me, there can be no doubt whatever; for here the special verdict finds that

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(a) *Powell*, 80.—(b) 1 *Ves. Jun.* 235.

the money was not paid on or before the day, when, if not paid, the assignment was to become absolute: it did therefore become absolute, so that this is strictly the case of an absolute assignment, and subject, therefore, to all the rules which affect it as such. It has been further said, that there is no privity of estate, because possession was not taken, nor privity of contract, in respect of which, the original lessee would be liable without possession. But it is not so, for there is a privity of estate, if legal possession, that is, acceptance of the thing assigned by acceptance of the assignment, be equivalent to actual entry, which it is, if there be any justice in the observations already made; and even as to privity of contract, there is such privity also, for the contract of the lessor is with the lessee and his assigns, and the defendants here are the assignees of the lessee: it is therefore a contract between the lessor and the assignees, that is, in this case, between the plaintiff and the defendants. The cases of bankruptcy have been alluded to, but they stand on a different ground. In the case of actual acceptance, assignees would of course be liable, and they may accept without entry; but the assignment is not compulsory on them to take; if they do not take, they will not be liable, notwithstanding the assignment; but if they elect to take, then it is their taking, yet they do not become liable as assignees by the mere assignment alone. To the cases of *Westerdell v. Dale*(*a*), and *Stone v. Evans* (*b*), it will be sufficient merely to refer, as shewing the disapprobation which Lord *Kenyon* certainly felt and expressed of the decision in *Eaton v. Jaques*; and to this it is hardly necessary to add, what is well known, that it did not meet with the approbation of the profession at large at the time. Still remain-

1819.  
  
 WILLIAMS  
 v.  
 BOSANQUET.

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(*a*) 7 Term Rep. 306.—(*b*) *Woodfall's Landlord and Tenant*, 5th edit. 82.



1819.  
 WILLIAMS  
 v.  
 BOSANQUET.

ing, however, as an authority, though a single authority;—when the present case came before this Court on demurrer, it was directed by the late Chief Justice to be turned into a special verdict, that we might have it argued before all the Judges to collect their opinions on the point; this has accordingly been done, and we have authority to say, that in the opinion of a great majority, *Eaton v. Jaques* is not to be considered as having been rightly decided. This case being therefore removed out of the way, and the Law being otherwise clear, the consequence is, that the plaintiff is entitled to judgment.

My Brother *Richardson* not having been present at the argument, declines giving any opinion.

Judgment for the plaintiff.

Monday,  
 May 24.

DALBY v. HIRST.

An usage for the off-going tenant of a farm in a particular district, to bestow his work, labour, and expense in manuring, tilling, fallowing, and sowing accord-

ing to the course of husbandry, and for the landlord to pay him a reasonable compensation in respect thereof, is a valid and reasonable usage. A declaration in *assumpsit* stated, that the plaintiff had sowed divers, to wit, ten acres of land with wheat, and divers, to wit, twenty other acres of land with clover and seeds, and that he had manured divers, to wit, ten acres of meadow land.—*Held*: that in effect this was an averment, that part of the lands was arable and part meadow land.—*Held*: also, that the word tenant being used generally in such declaration, applies only to persons occupying farms, as husbandry tenants in the ordinary sense, and not to tenants for lives or in tail.

THIS was an action of *assumpsit*: the declaration contained three special counts; the first of which stated, that on the 2d of May, 1800, the plaintiff became and was tenant to one *Samuel Elam*, of a certain farm, containing 40 acres of land, situate in the parish of *Bradford*, in the county of *York*, the reversion of the said farm belonging to the said *Samuel Elam*; and that the plaintiff

continued tenant thereof until the 1st of *January*, 1807, on which day the reversion came to, and vested in one *Joseph Hirst*, by assignment thereof, whereon the plaintiff became tenant of the said farm to the said *Joseph Hirst*, and so continued until the 1st of *December*, 1816, when *Joseph Hirst* died, whereupon the reversion vested in the defendant, then being the son of the said *Joseph Hirst*, and that the plaintiff became tenant of the farm to the defendant; that according to the due course of husbandry, used and approved of in the country where the premises lay, the tenant of every farm, containing arable and meadow lands, not being restricted from so doing by any special agreement, had been used and accustomed, from time to time during his tenancy, to bestow his work and labour, care, diligence, and expense in and about the manuring, tilling, fallowing, and sowing, that is to say, with corn, clover, and seeds, all such lands of his farm as, in the due course of husbandry used and approved of, required to be manured, tilled, fallowed, and sown, as aforesaid, and hath been used and accustomed, at his own expense, to find and provide all materials and necessary things used and applied in and about such manuring, tilling, fallowing, and sowing; and in case the tenant of such farm had quitted the same without having received the benefit of such manuring, tilling, fallowing, and sowing, as aforesaid, according to the due course of husbandry in respect of such tenancy, and had not received upon his entry on such farm an equivalent benefit without paying for the same, the landlord of such farm had, during all the time aforesaid, been used and accustomed (unless exempted therefrom by any special agreement) to make such tenant, as aforesaid, (he having used and cultivated the farm according to the due course of husbandry) a reasonable compensation in respect of such manuring,

1819.  
DALBY  
v.  
HIRST.

1819.  
DALBY  
v.  
HIRST.

tilling, fallowing, and sowing, as aforesaid, of which such tenant, at the time he so quitted such farm, had not according to the due course of husbandry in respect of such tenancy received the benefit. The plaintiff then averred, that he continued to be, and was, tenant to the defendant of the land of the farm until the 2d of *February*, 1818, and of the buildings thereof, with the appurtenances, until the 1st of *May*, in that year, on which last mentioned day he quitted and delivered up possession of the land and buildings of the farm respectively to the defendant; and that during his tenancy, the plaintiff, not being restricted from so doing by any special agreement, did bestow his work and labour, care, diligence, and expense in the manuring, tilling, and fallowing divers, to wit, ten acres of the said land, and in tilling and sowing with wheat divers, to wit, ten other acres of the said land; and in sowing with clover divers, to wit, ten other acres of the said land; and in sowing with seeds divers, to wit, ten other acres of the said land; and in manuring divers, to wit, ten acres of the said meadow land; the said portions of land, in the due course of husbandry there used and approved of, requiring respectively to be so manured and tilled, fallowed, and sown, as aforesaid. And the plaintiff farther said, that at the time he so quitted the farm, he had not received the benefit of such manuring, tilling, fallowing, and sowing, so by him made according to the due course of husbandry in respect of such tenancy; that he, upon entering on the said farm, did not receive any equivalent benefit, and that, during his tenancy thereof, he cultivated the same according to the course of good husbandry in respect of such tenancy (of all which premises the defendant had notice); and thereupon, in consideration of the premises, he the defendant not being exempt therefrom by any special agreement, undertook and promised

the said plaintiff, to make to him such reasonable compensation, as aforesaid, in respect of such manuring, tilling, fallowing, and sowing, of which the plaintiff, at the time he had quitted the said farm, had not, according to the due course of husbandry, in respect of the tenancy, received the benefit; and the plaintiff averred, that a reasonable compensation in respect of such manuring, tilling, fallowing, and sowing, of which the plaintiff, at the time he so quitted the said farm, had not, according to the due course of husbandry, in respect of the said tenancy, received the benefit, amounting to £200, whereof the defendant had notice, and according to the said promise and undertaking in that behalf made, became liable to pay the plaintiff the said sum of money, when the defendant should be thereunto afterwards requested.

The second count stated, that in consideration that the plaintiff had manured, tilled, fallowed, and converted five acres of the land into grass land, and had left manure made on the land, and unsprayed thereon, at the time he quitted the farm, and had sown twenty acres with wheat and clover, which in the due course of husbandry required to be manured, tilled, fallowed, and sown, and left the wheat, clover, and seeds growing thereon for the use or benefit of the defendant, he the defendant promised to pay the plaintiff so much as he therefore reasonably deserved to have for so doing, when he the defendant should be thereunto afterwards requested.

The third count stated, that the plaintiff having expended divers large sums of money, and bestowed his work and labour by himself and his servants, in manuring, tilling, fallowing, ploughing, harrowing, and sowing the said farm; and being also possessed of large quantities of manure on the farm; that the defendant, in consideration of the premises, and also in considera-

1819.  
DALBY  
v.  
HIRST.

1819.  
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 DALBY
 v.
 HIRST.

tion that the plaintiff would relinquish and give up the farm on a certain day therein mentioned, and the benefit of his work and labour, and would leave the manure thereon for the use of the defendant; the defendant promised to pay the plaintiff so much money as one *Edward Wilby* and one *George Armitage* should ascertain and determine to be a due and proper sum of money for the same: the plaintiff then averred, that he relinquished the premises, and the benefit of his work and labour, and left the manure for the defendant; and that *Wilby* and *Armitage* afterwards, in pursuance of the reference, ascertained and determined that the defendant should pay to the plaintiff £140. 14s. 2d. To these special counts were added counts for work, labour, and materials found; for work and labour generally, for crops of corn, turnips, and clover, and divers fallows, and large quantities of tillage, and also large quantities of manure, goods bargained and sold by plaintiff to defendant, and the usual money counts.—The defendant pleaded *non-assumpsit*, and paid £20 into Court on all the common counts of the declaration.

At the trial of the cause before Lord Chief Baron *Richards*, at the last assizes at *York*, the plaintiff, in order to support the custom and real usage of the Country, as stated in the first count of the declaration, and on which alone evidence was adduced as to that point, called several witnesses, who swore, in substance, that the usage was for the landlord to make a reasonable compensation to the outgoing tenant, in case he had not obtained an equivalent for the improvements in tilling and sowing the farm, as well as for the manure left in it at the time of his quitting the same. The first stated, that it was the custom to allow the outgoing tenant for the tillage that was left on the farm; but he did not know whether it was to be allowed by the landlord or the incoming tenant. The second said, that it was the custom to

1819.

DALBY
v.
HIRST.

have two valuers appointed, who were to make a valuation between the landlord and the outgoing tenant at the time he quitted the farm; and if the tenant had been guilty of dilapidations, the landlord received an equivalent; and if the tenant was entitled to any thing, they were to ascertain what was due to him from the landlord; and that seeds and manure were valued for the tenant in case any were left by him on the farm. A third swore, that the custom was for a tenant to go off in the same state in which he entered on the farm, and what was valued to him at coming in, was re-valued at his going off, and that in general there was no allowance for manure laid on the meadow lands, though sometimes there was. A fourth said, that the usage was to value lime and improvements only.—For the defendant, it was attempted to be proved that there was no such custom, that there had been a practice of valuing, but that it was always done by agreement, though it could not be sworn that such a custom had not existed without an agreement. It appeared that the valuation of £140. 14s. 2d. for the plaintiff, as stated in the third count of the declaration, was made for tillage and half tillage, wheat, seeds, and grass sown, and manure left on the premises. For the defendant it was objected,—First, that the custom as laid in the declaration was not proved, nor was it averred or stated to be a reasonable custom. Secondly, that the custom was bad, as it did not appear to have existed from time immemorial; that it was unreasonable, as it stated that the tenant of every farm, containing arable and meadow lands, was entitled to a compensation; that this might, therefore, apply to others than tenants for years, and was uncertain. Thirdly, that the declaration was substantially bad, as the custom stated is “for every tenant of any farm, containing arable and meadow lands;” and it was not averred, that the plaintiff’s farm

1819.
 ~~~~~  
 DALBY  
 v.  
 HIRST.

contained *arable* lands, nor that he tilled all such lands as were required to be tilled, but only that he tilled some. It was also alleged in the declaration, that the tenant might receive an equivalent for manuring, &c. those lands which required to be manured; and no evidence was adduced to shew that the lands in question required manure, neither was it proved what expenses the plaintiff had incurred, nor what benefit he had received when he took possession of the farm. The Lord Chief Baron, however, was of opinion, that in point of strictness, this was an usage of the country and not a custom, and that such usage was not unreasonable, and left it to the Jury to determine, whether the compensation claimed by the plaintiff was usual. His Lordship also thought, that the usage, as laid in the declaration, had been fully proved. They accordingly found a verdict for the plaintiff, damages £122. 15s.

Mr. Serjt. *Cross*, on a former day in this term, had obtained a rule *nisi*, that the judgment in this case might be arrested, or the verdict set aside and a new trial granted, or the damages be reduced to the matters and particulars which formed the subject of the first count of the declaration. By these particulars, the plaintiff claimed the sum of £12. 1s. for a quantity of manure left in a heap on the farm; £22. 10s. for grass land which the plaintiff had not entered upon, and a quantity of manure in the yard amounting in value to £25.

Mr. Serjt. *Hullock* subsequently shewed cause; *first*, as to the arrest of judgment:—two objections have been raised for the defendant, *namely*, that the form of the first count of the declaration was bad; and that the custom as laid in that count was unreasonable and uncertain. As to the first objection; it has been said, that that count did not

contain an averment, that the farm consisted of arable and meadow land, and as it was proved to have consisted of both it was defective; and the second objection, as to the structure of that count was, that the plaintiff had not averred, that he had tilled all lands requiring to be tilled, but only some of them. But the count itself contains sufficient answers to these objections; if not, the omission or defect must be cured by verdict. The plaintiff avers in that count, the sowing with wheat of a certain number of acres of land. When the wheat was sown the land must have been arable; so when the clover and seeds were sown, the lands on which they were sown must have been also arable. The plaintiff also averred, that he manured a certain number of acres of meadow land. These averments clearly shew that the farm consisted of both arable and meadow land, for the allegation is distinct as to the manuring of meadow land. As to the objection, that it is not averred, that all the lands which required tilling had been tilled; it is alleged, that the "portion of lands, manured, tilled, and sown in due course of husbandry there used and approved of, requiring respectively to be so manured, tilled, fallowed, and sown, as aforesaid." These lands, therefore, were only necessary to be tilled according to the due course of husbandry at that time. If all the lands which ought to have been tilled were not so, the defendant should have given it in evidence. But even if the first count be defective, on the objections raised to it, still such defect is cured by verdict. *Spieres v. Parker* (a), *Rushton v. Aspinall* (b), *Collins v. Gibbs* (c), *Skinner v. Gunton* (d). It has been farther insisted for

1819.  
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 DALBY
 v.
 HIRST.

(a) 1 Term Rep. 145, per Buller, J.—(b) 2 Doug. 683, per Mansfield, C. J.—(c) 2 Burr. 699.—(d) 1 Wms. Saund. 228. n. 1. N. B. All the cases wherein defects have been held to be cured by verdict, are collected in *Siennel v. Stagg*, 1 Wms. Saund. 228. n. 1.

1810.
DALBY
1.
HIRST.

the defendant, that even if the first count be good in point of form, still that the custom as laid in that count was unreasonable and uncertain, and therefore bad in point of law: but it was not laid in the declaration as a legal custom, nor was it intended so to be, for it is merely stated to be a common usage in the neighbourhood. In *Legh v. Hewitt* (a), where an objection similar to the present was raised, Lord *Ellenborough* said (b), "The Jury have found a verdict for the defendant, under an impression, that the words in the declaration, 'according to the custom of the country,' required a more strict and specific proof in respect of the relative quantity of land allowed to be annually in tillage than I think they demanded. The words are, that the defendant promised to 'use and occupy the premises in a good and husbandlike manner, according to the custom of the country where the said premises lie.' By which I understand the parties to have meant no more than this, that the tenant should conform to the prevalent usage of the country where the lands lie. From the subject matter of the contract, it is evident that the word *custom*, as here used, cannot mean a *custom* in the strict legal signification of the word: for that must be taken with reference to some defined limit or space, which is essential to every *custom* properly so called. But no particular place is here assigned to it; nor is it capable here of being so applied. What shall be considered in farming as a good and husbandlike manner, must vary exceedingly according to soil, climate, and situation; and, therefore, the *custom of the country*, with reference to good husbandry, must be applied to the approved habits of husbandry in the neighbourhood under circumstances of the like nature." The language of Mr. Justice *Le Blanc* in that case is equally strong, and

(a) 4 East, 154.—(b) *Ibid.* 159.

coupled with Lord *Ellenborough's*, is a sufficient answer to the objection, as to the custom's not being laid in the declaration as a custom from time immemorial. All customs of husbandry are founded on the same principles as the present, *namely*, the existing and prevalent usage of the country where the farm may be situate. But it has been said that this custom is unreasonable: on the contrary, it is extremely beneficial both to the landlord and to the tenant; it induces the latter, when he is about to quit his farm, to till it in the same manner as if his term were to continue. If he were to receive no remuneration from his landlord, he might expend all the manure on the part he was entitled to till, on taking his way-going crop. But by this usage, the whole of the estate is kept in a proper state of cultivation, and the tenant receives a compensation for so doing. But this custom is if possible more beneficial to the landlord than the tenant. The one is reimbursed his expenses at the end of the term, the other is entitled to expect that his lands will be left in a good state of cultivation, by which means he may raise the rent on the succeeding tenant. A custom similar to the present usage has been recognised and sanctioned in the cases of *Senior v. Armitage* (a), and *Coleman v. Harvey* (b): though *Senior v. Armitage* was twice tried, still no objection was made as to the validity of the custom; at the first trial the plaintiff proved that there was an agreement between him and the defendant, and Mr. Justice *Bayley* was of opinion that the plaintiff was bound to produce it, and that the custom was controlled by it, and consequently directed a nonsuit; but on the second, Lord Chief Baron *Thompson* thought it a valid custom, and that it was sufficient for

1819.
 DALBY
 v.
 HIRST.

(a) 1 *Holt, N. P. Cas.* 197.—(b) *Tried at York before Rooke, J.* 1813.

1819.
 ~~~~~  
 DALBY  
 v.  
 HIRST.

the plaintiff to shew that it existed in the neighbourhood. In *Wigglesworth v. Dallison* (a) it was established that a custom, that tenants, whether by parol or deed, should have the way-going crop after the expiration of their terms, was good; and Lord Chief Justice *Mansfield* there said (b), “that it was a good custom, and that it was just, for that he who sows ought to reap; and that it was for the benefit and encouragement of agriculture.” So, here, the custom is for the benefit of agriculture. In *Beavan v. Delahay* (c), the custom was stronger than the present; for it was there determined, that a custom for a tenant to leave his way-going crop in barns of the farm, after the expiration of the lease, and when the tenant had quitted the premises, was a good custom. This custom is, therefore, neither unreasonable nor uncertain. The first count alleges, with sufficient certainty, that all the lands requiring tillage were tilled, if not, the defect is cured by verdict. As to a new trial, there can be no grounds for it whatever, as the evidence for the plaintiff is more than sufficient to support the custom and first count of the declaration; the verdict, therefore, cannot be disturbed on that ground; neither is the defendant entitled to have the damages reduced, as the charges for manure, and the deduction required by the plaintiff for the grass land, are comprehended in the first count of the declaration, and the defendant paid money into Court on the common counts only.

Mr. Serjt. *Cross* in support of the rule. This case is complicated both as to law and facts. The evidence adduced at the trial, was wholly insufficient to support the custom as laid in the first count of the declaration. As to the sufficiency of the declaration itself,

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(a) 1 *Doug.* 206.—(b) *Id.* 207.—(c) 1. *H. Bl.* 5.

1819.  
 DALBY  
 v.  
 HIRST.

which is in *assumpsit*, the defendant is alleged to have promised to pay the plaintiff in consideration of the premises. But the premises do not contain a sufficient legal consideration for the promise, for they merely comprise an alleged usage in the country where the farm in question is situate, and the allegation is, not that the defendant undertook to pay according to the usage, but the promise is founded in consideration of the usage itself, which is, therefore, insufficient. There is a wide distinction between custom and usage, the one, must be considered as the *lex loci*; the other, a mere matter of fact, and triable *in pais*. A party might be bound by the former, although he were ignorant of its existence. Custom creates a legal title, while usage is only evidence of it, of which the party must have knowledge before he can be bound. In *Wigglesworth v. Dallison* (a), the defendant pleaded *liberum tenementum*, and the plaintiff in his replication pleaded a custom within the parish, whereof the memory of man was not to the contrary, for tenants to have the way-going crops. That custom was founded on *lex loci*, and bound the parties. The case of *Legh v. Hewitt* (b) was founded on an alleged usage, and not on custom. It appears that *Senior v. Armitage* (c) was founded on a custom. If the plaintiff here, in his first count had alleged, that the defendant undertook to make a compensation without mentioning a custom or usage so to do, he might have recovered; but he has averred, that in consideration that other landlords of farms, in that part of the country, had been accustomed to make a reasonable compensation to tenants, for tilling and manuring, that the defendant undertook to make a similar compensation. It does not appear to what

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(a) 1 Doug. 201.—(b) 4 East, 154.—(c) 1 Holt's Rep. 197.

1819.

DALBY

v.

HIRST.

extent of country this custom might apply, or what tenants were entitled to the compensation; by the terms of the declaration, it might extend even to a tenant for life, who is entitled to emblements by the general rule of law: and by this custom he would be entitled to payment for his tillage also. Besides, the plaintiff's claim might be attended with most dangerous consequences. He had been tenant of the farm in question nearly twenty years, and held it under three successive landlords. If, therefore, he received an equivalent when he entered, the defendant cannot now ascertain what such equivalent was, nor has he received notice to prove it, and, therefore, the plaintiff is not entitled to any compensation on his quitting the farm. [Lord Chief Justice *Dallas*. The rule is, that whatever is sufficient to put the party to inquire is equivalent to notice, besides, here it is averred to be the general custom of the country where the farm is situated.] The usage itself is unreasonable and uncertain, for it seems that by the term tenant, every species of tenant would be entitled to this compensation. But, can a tenant for life be entitled to unexhausted manure, being also entitled to emblements? The usage is not founded on local fact, or the state of the country. If a tenant has benefited his estate for an indefinite period of years, how is the equivalent to be ascertained? A further objection is, that it appears that the tenant is entitled to this equivalent whenever he quits his farm; so that he would be entitled, even if he deserted it. It should have been shewn, that the tenant was entitled on quitting at the expiration of his term. [Lord Chief Justice *Dallas*.—It is stated that the plaintiff, when he quitted the farm, had not received the benefit of manuring, &c. according to the course of husbandry, in respect of his tenancy.] The usage alone is not a sufficient consideration to

raise an assumpsit: and even if it were, the usage itself is unreasonable and indefinite. No precedent can be found where a plaintiff has succeeded on a similar usage. In *Senior v. Armitage* (a), though a new trial was directed, the cause was not carried down. There is, therefore, no instance where a tenant is entitled to such a pecuniary remuneration as is now sought for. Though an usage may in some cases be given in evidence, still, an undertaking founded on such usage cannot be. The declaration does not even allege that it was the duty of the landlord to make a compensation, or the right of the tenant to receive it; neither is the usage confined to time, tenancy, or place. With respect to the structure of the first count of the declaration, it is clearly bad, as it is not alleged that the farm consisted of arable and meadow land, which should have been stated, to bring this case within the usage; and it should have been shewn that it consisted of arable and meadow lands when taken by the tenant, and not when they were given up: neither does it allege that all the lands were tilled that required tillage, but only certain portions. As to the evidence, it was proved that the usage was of a complicated nature, and that it varied in circumstances, and did not amount to an universal or general usage, as laid in the declaration. No agreement was proved, nor was it ascertained whether the landlord, or the incoming tenant made a compensation to the outgoing one: neither was it in evidence, that the plaintiff had not received an equivalent on entry, the proof of which lay on him, it being a negative averment, *Williams v. the East India Company* (b). As to the reduction of damages, the plaintiff has included more items in his

1819.  
DALBY  
v.  
HIRST.

(a) 1 *Holt's Rep.* 197.—(b) 3 *East*, 193.

1819.  
DALBY  
v.  
HIRST.

particulars than are contained in the declaration, and they are not distinctly alleged to be parts of the usage.

*Cur. Adv. Vult.*

Lord Chief Justice DALLAS, on this day, delivered the following judgment of the Court:—

A motion has been made in this cause for a new trial; and in case the Court should be of opinion that a new trial ought not to be granted, then the defendant contends that three sums ought to be deducted from the damages; besides which he has also moved in arrest of judgment.—The action is of assumpsit; the declaration states that on the 2d May, 1800, the plaintiff became tenant to *Samuel Elam* of a farm, containing divers acres of land, with the appurtenances, of which the reversion belonged to the said *Samuel Elam*; that the plaintiff continued such tenant till the reversion came to, and vested in *Joseph Hirst* by assignment; that the plaintiff then became tenant to the said *Joseph Hirst*, and so continued till his death, when the reversion came to and vested in the defendant, and then the plaintiff became his tenant.—The declaration then states, that according to the due course of husbandry used and approved of in the country where the said premises lie, the tenant of every farm containing arable and meadow lands, not being restricted from so doing by any special agreement, hath been used and accustomed, from time to time, during his tenancy, to bestow his work and labour, care, diligence and expense in and about the manuring, tilling, fallowing, and sowing, (that is to say) with corn, clover, and seeds, all such lands of his said farm, as in the due course of husbandry, used and approved of, required to be manured, tilled, fallowed, and sown as aforesaid;

and hath been used and accustomed, at his own expense, to find and provide all materials and necessary things used and approved in and about such manuring, tilling, fallowing, and sowing as aforesaid; and in case the tenant of such farm has quitted the same without having received the benefit of such manuring, tilling, fallowing, and sowing as aforesaid, according to the due course of husbandry, in respect of such tenancy, and has not received, upon his entry on such farm, an equivalent benefit without paying for the same, the landlord of the said farm has, during all the time aforesaid, been used and accustomed, unless exempted therefrom by any special agreement, to make to such tenant as aforesaid, (he having cultivated such farm according to the due course of husbandry), a reasonable compensation in respect of such manuring, tilling, fallowing, and sowing as aforesaid, of which such tenant, at the time he quitted the said farm, had not, according to the due course of husbandry, in respect of such tenancy, received the benefit. The plaintiff then says, he continued tenant of the said farm (to wit) of the lands thereof, to the 2d *February*, 1818, and of the buildings to the 1st of *May*, in the said last year, on which days respectively, he quitted and delivered possession: that during such tenancy (*i. e.*) on the 1st *February*, 1815, and on divers other days and times between that day and the day of delivering up, not being restricted by any such agreement, he did bestow his work and labour, care, diligence and expense, in and about the manuring, tilling, and fallowing divers, to wit, ten acres of the said land, and in tilling and sowing with wheat, divers to wit ten other acres of the said land, and in sowing with clover, divers to wit ten other acres, and in sowing with seeds, divers to wit ten other acres, and in manuring, divers to wit ten acres of the said

1819.  
 D. ALBY  
 v.  
 HIRST.



1819.  
DALBY  
v.  
HIRST.

meadow, the said portions in due course of husbandry there used and approved of, requiring respectively to be so manured, tilled, fallowed and sown as aforesaid, and averring that he had not received any equivalent benefit, and that during his tenancy he cultivated the same according to the due course of husbandry, of which the defendant had notice; and thereupon, in consideration of the premises, the defendant, not being exempt therefrom by any special agreement, undertook to make him such reasonable compensation in respect of such manuring, tilling, fallowing, and sowing as aforesaid, of which the plaintiff had not in the due course of husbandry received the benefit. And the plaintiff avers that he had not received such benefit, and that a reasonable compensation therefore, amounted to a large sum of money, to wit, £200, of which the defendant had notice. There are two other special and also common counts in the declaration.

The general issue was pleaded to this declaration, and the cause was tried before Lord Chief Baron *Richards* at the last assizes for the county of *York*, when the plaintiff obtained a verdict for £122 15s.

His Lordship has stated the evidence in his report, and it appears that the Jury were well warranted in finding a verdict for the plaintiff; as the custom or usage appears to have been most satisfactorily proved. If the Jury had deemed it to be unreasonable, they ought to have found for the defendant; but we are satisfied there was no good ground for contending before them that the custom, or rather usage, was unreasonable. It affords the strongest encouragement to good husbandry of farms. It is beneficial to landlords and tenants also; the land of the former receiving a lasting benefit from the labour and expense bestowed by the tenant, on payment of a reasonable compensation to the latter, and

the tenant being thereby encouraged to pursue a good course of husbandry, by the assurance he has, that if his continuance on the farm should not enable him to reap the full benefit of what he has done, he will have a right to call on his landlord for proportionate compensation. We think there is no ground whatever for disturbing the verdict (which appears to have been to the satisfaction of the Lord Chief Baron), otherwise than by reducing the damages to £100 5s. by deducting the sum of £22 10s. included therein, for grass land which the plaintiff did not enter upon. The rule, therefore, must be absolute to that extent, and discharged as to the new trial.

There is also a motion in arrest of judgment, founded on some supposed defects in the first count of the declaration.—First, it is alleged that the count must aver that the custom or usage is reasonable. We think the custom reasonable on the face of the declaration, for the causes before stated; and that the facts and circumstances stated therein form a good and substantial consideration for the defendant's promise.—Secondly, it has been contended that the custom is bad, inasmuch as it is stated to be that the tenant of every farm containing arable and meadow lands is entitled to this compensation; and it is urged that this may apply to others than mere tenants for years, and is therefore uncertain. We think that the words, "tenant of every farm containing arable and meadow lands, not being restricted from so doing by any agreement," exclude such an idea, and shew with sufficient certainty that it is applicable only to tenants of farms in the ordinary sense; and that, according to the common acceptation of the term, it applies only to persons occupying as husbandry tenants.

Thirdly, It has been urged that the declaration is

1819.  
DALBY  
v.  
HIRST.

1819.  
DALBY  
v.  
HURST.

substantially defective in this, that the custom and usage is for every tenant of every farm containing arable and meadow lands, &c. and that it is not averred that the plaintiff's farm contained arable land. It certainly is not so averred in express words, but in effect it is so stated, for the plaintiff, by his declaration, claims a compensation for the work and labour, care, diligence, and expense bestowed by him in manuring, tilling, and fallowing divers acres of land, in tilling and sowing other lands with wheat, and in sowing with seeds divers other acres, parts of the farm of which he was tenant. There is then in effect a statement that the lands were arable lands, and at the utmost it is only a defective or inaccurate statement of part of the ground or title of action. On this motion we must hold that the plaintiff at the trial proved that these lands were arable, because without doing so, he could not have obtained a verdict. In the case cited by my brother *Hullock*, of *Rushton v. Aspinale* (a), Lord *Mansfield* lays down the rule to be, that "where the plaintiff has stated his title or ground of action defectively or inaccurately (because to entitle him to recover, all circumstances necessary in form or substance to complete the title so imperfectly stated, must be proved at the trial), it is a fair presumption after verdict that they were proved; but that where the plaintiff totally omits to state his title or cause of action it need not be proved at the trial, and therefore there is no room for presumption." In the present case the plaintiff must have proved that he manured, tilled, fallowed, and sowed the lands as alleged in the declaration, and by this, it must have been proved that the lands were arable.

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(a) *Doug.* 654.

The rule, as far as it relates to arresting the judgment, must therefore be

Discharged.

1819.  
DALBY  
v.  
HIRST.

TROTMAN v. HOLDER.

Monday,  
May 24.

THIS was an action of trespass *quare clausum fregit*. The defendant pleaded,—first, not guilty; secondly, a justification of a right of way, over the *locus in quo*, to a close of which he was the occupier; and, thirdly, *liberum tenementum*. The plaintiff added a similiter to the first plea, and traversed the second and last in his replication; and added a new assignment as to the second. Issue was joined on both these pleas, as well as the new assignment. The cause was referred to an arbitrator, who found for the plaintiff, on the first plea of not guilty, without any damages; on the second for the defendant generally; on the third for the plaintiff, without damages; and on the issue taken on the new assignment, for the plaintiff, with one shilling damages.

Mr. Serjt. *Lens*, on a former day in this term, had obtained a rule *nisi* that the Prothonotary might tax the plaintiff the full costs of his cause, with the deduction of the costs on the issue found for the defendant, by

defendant on the second plea. Held: that the plaintiff was entitled to his full costs, deducting the defendant's costs on the issue found for him; although the witnesses of the latter were detained at the assizes, by the plaintiff's having withdrawn his record for the purpose of amending it.

In trespass *quare clausum fregit* the defendant pleaded—1st, not guilty; 2dly, a justification of a right of way; and lastly, *liberum tenementum*. The plaintiff joined issue on the first and traversed the second and last pleas; and new assigned as to the second. An arbitrator found for the plaintiff generally on the first and last pleas, and also on the new assignment with one shilling damages; and for the de-

1819.  
 TROTMAN  
 v.  
 HOLDER.

not allowing the plaintiff any costs on that issue. He relied on the case of *Martin v. Vallance* (a), as being precisely in point, with the exception that the defendant had there only justified a right of way, without pleading *liberum tenementum*. He also cited *Asser v. Finch* (b), and *Ibbotson v. Browne* (c).

Mr. Serjt. *Vaughan* now shewed cause, on an affidavit which stated, that the record in this cause was entered the first for trial at the Spring assizes at *Glocester*, 1818; that the parish having been improperly laid in the declaration, the plaintiff withdrew his record; that leave was given him to amend, by altering the name of the parish; after which the cause was re-entered, and stood nearly the last in the paper, when it was referred as above stated. He insisted that as the defendant had succeeded in the substantial part of the cause, viz. the right of way, he was at least entitled to his costs on that issue, and it would be a great hardship that he should bear the whole of the costs of the cause; and more particularly so, as in consequence of the plaintiff's amendment, many of the defendant's witnesses, who were in attendance, became unnecessary, and the remainder of them were obliged to wait more than a week, as the cause was removed from the top to nearly the bottom of the paper on account of the record being at first defective. The case of *Gregory v. Ormerod* (d), though it differs from *Martin v. Vallance* as to the traversing, and not traversing the pleas of justification, yet Lord Chief Justice *Mansfield*, in the former, said (e), "It is a monstrous thing that when a plaintiff has been wholly

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(a) 1 *East*, 380.—(b) 2 *Lev*. 234.—(c) 1 *Barnes*, 98.  
 —(d) 4 *Taunt.* 98.—(e) *Ibid.* 101.

in the wrong in bringing an action for a trespass, which is fully justified by a right of way, or other right, he therefore shall have full costs, because he brings another action for another little trifling trespass which he may happen to be able to prove." *Cook v. Green* (a) is applicable in principle to the present, and is an authority to shew that a defendant is entitled to the costs both of the pleadings, and the trial of the issue found for him.

1819.  
TROTMAN  
v.  
HOLDSR.

The Prothonotary said, that that was never done, except in the action of replevin.

Mr. Serjt. *Lens*, in support of his rule, was stopped by the Court.

*Per Curiam*.—We think the plaintiff is entitled to the full costs of his cause, as prayed for. *Gregory v. Ormerod* is entirely out of the question; and this case therefore comes within that of *Martin v. Vallance*, where the Court of *King's Bench* said, that after the practice had been so long ago settled by the case of *Asser v. Finch*, which had been followed up by subsequent determinations, that it was then too late to depart from it. Indeed, there is no case to be found where there are several issues, in which a defendant has been held entitled to have the costs of an issue found for him, deducted from the costs of the trial, which the plaintiff may be entitled to, on those issues which are found for him. *Postan v. Stanway* (b) is an authority in favour of the plaintiff on this point.

Rule absolute.

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(a) 5 *Taunt.* 594.—(b) 5 *East*, 261.

1819.

Monday,  
May 24.

GORTON and another, Executors, v. DYSON and another,  
Executors.

Notice was given to the defendants, as executors, to produce the probate of their testator's will at the trial, which they refused. Held: that a document purporting to be the original will, and produced by an officer of the Ecclesiastical Court of *Chester*, under the seal of that Court, was admissible, as secondary evidence to shew that their testator had acknowledged therein that he had received money in his lifetime for the use of the plaintiff.

THIS was an action of *assumpsit* for money had and received, and brought by the plaintiffs as executors of *Mary Sandford*, deceased, against the executors of *James Holland*, deceased, who had been the executor of *Frances Holland*. The first count of the declaration stated that *James Holland*, in his life time, was indebted to *Mary Sandford*, in her life time, in £3000, for money had and received to her use, and averred a promise by him accordingly. To this, were added counts for money lent, money paid, and an account stated. The defendants pleaded, first, the general issue; secondly, *non assumpsit* by *James Holland*, *infra sex annos*; and lastly, a plea of set-off; on all of which issue was joined.

At the trial of the cause before Lord Chief Justice *Dallas*, at *Westminster*, at the sittings after the last term, the facts appeared to be these:—*Frances Holland* had bequeathed to *Mary Sandford* the sum of £1200 as a legacy, which *James Holland* received for the use of the said *Mary Sandford*; that he afterwards made his will, in which he acknowledged that he was indebted to her in the sum of £1200, for money he had received for her use. To prove the receipt of this sum, notice was given to the defendants, by the plaintiffs, to produce the probate of this will; but as no evidence was adduced to shew that it was in the possession of the defendants, it was not produced, but a document was exhibited by an officer of the Spiritual Court of *Chester*, purporting to be the original will of *James Holland*, and bearing the ecclesiastical

seal of that Court, by which it appeared that the testator gave and bequeathed to his sister, *Mary Sandford*, an annuity of £700 for her life, payable out of his freehold estates; and afterwards expressly declared "that the annuity so given to her was to be in full discharge, and that she was to accept the same in full satisfaction and extinguishment of a certain debt or sum of £1200, which he stood indebted to her, as and for a legacy theretofore bequeathed to her by his late aunt, *Frances Holland*; and for which she the legatee was to execute a good and valid release to the testator's other executors accordingly, as soon as might be after his decease, otherwise that such annuity should not be paid or payable." On this document alone, being relied on by the plaintiffs, as an acknowledgment by the defendants' testator, that he had received this money for the use of the plaintiff's testatrix, it was objected for the defendants,—First, that *James Holland's* will ought to have been proved by one of the subscribing witnesses, and that the probate not having been produced by the defendants, the next best evidence was the act of the Spiritual Court, which was not proved, or that, at all events, it was necessary to prove that the signature of the testator affixed to the document produced, was in his hand-writing, as it might be the hand-writing of another person of his name; that either a copy of the probate should have been produced, or parol evidence given of the contents of the original will. Secondly, that this was in effect an action for a legacy, for which a suit at law could not be maintained, *Deeks v. Strutt (a)*, and more particularly so in the form of an action for money had and received. His Lordship, however, held that as the

1819.  
 GORTON  
 v.  
 DYSON.

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(a) 5 Term Rep. 690.



1819.  
GORTON  
v.  
DYSEN.

defendants had notice to produce the probate, and had not done so, that the original will, as produced under the seal of the Ecclesiastical Court of *Chester*, was admissible as secondary evidence, and that the sum in question was money had and received in the hands of *James Holland*, the testator.

The Jury accordingly found a verdict for the plaintiffs, damages £1200. His Lordship, however, saved both the objections for the consideration of the Court.

Mr. Serjt. *Hullock*, on a former day in this term, obtained a rule *nisi*, that this verdict should be set aside, and a nonsuit entered on the first ground only.

Mr. Serjt. *Lens* now shewed cause, and produced a copy of the original will of *James Holland*, on which an indorsement was made by the officer of the Ecclesiastical Court of *Chester*, who produced the original at the trial, stating that a probate had been granted to the defendants on that will as the will of *James Holland*, and that the defendants had acted on it accordingly. He therefore submitted, that there could now be no doubt but that that was the instrument on which alone the probate issued; that the objections raised at the trial, that it was incumbent on the plaintiffs to have proved the hand-writing of the testator to the execution of his will, or that the original was not admissible in evidence, were now answered, and that the plaintiffs were entitled to retain their verdict.

Mr. Serjt. *Hullock*, in support of the rule.—When the document, purporting to be the original will, was produced at the trial, no indorsement was made thereon

by the officer of the court of *Chester*. The declaration of that officer now produced on the copy of the original, that the defendants had treated such will as the will of the testator, was clearly evidence against them. But still that indorsement alone is the only evidence to shew that they had so treated it. If the defendants, as executors, had treated it as the will of the testator, it would amount to a sufficient recognition to charge them as such; but still they were not shewn to have been so connected with that instrument as to make them chargeable. Besides, there was no proof that the original will was made by the testator, or of his identity; nor was it shewn that the defendants are the same persons who acted as executors, or took out the probate of such will.

1819.  
GORTON  
v.  
DYSON.

Lord Chief Justice DALLAS.—This was an action brought against the defendants, as executors, who could only become so by taking out a probate of the will of their testator. It was proved at the trial that they had notice to produce the probate, which they did not do. The question then raised was, whether the original will, as exhibited by the officer of the Spiritual Court at *Chester*, was admissible as secondary evidence. I thought it was, and said that the ground on which I admitted it, was that it was secondary evidence, the probate being the best. I did not express my opinion, whether it might be admitted as original evidence, but thought that, under the circumstances, it might be received for the particular purpose for which it was offered.

Mr. Justice RICHARDSON.—The defendants had notice to produce the probate, which they did not comply with. It appears they have acted on the original docu-

1819.  
GORTON  
v.  
DYSON.

ment, which was produced at the trial as the will of *James Holland*, and sworn to the value of his effects accordingly; and that they have also obtained a probate under it as such. Is not this, therefore, sufficient evidence to connect the defendants, as executors, with the will of their testator, as well as proof to shew that such will was made by the testator, without proving his hand-writing? I think the document was properly admitted in evidence at the trial, and consequently that this rule must be discharged.

Mr. Justice PARK and Mr. Justice BURROUGH concurred.

Rule discharged (a).

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(a) In *Rex v. Barnes*, 1 *Stark. Rep.* 253, it was held by Mr. Justice *Le Blanc*, that, although the probate of a will had been produced, the will itself could not be used in evidence upon the mere production of it by the officer of the Ecclesiastical Court, without some indorsement upon it for the purpose of authentication.

END OF EASTER TERM.

# **C A S E S**

**ARGUED AND DETERMINED**

**IN THE**

**Courts of Common Pleas**

**AND**

**Exchequer Chamber,**

**IN**

***TRINITY TERM,***

**IN THE**

**FIFTY-NINTH YEAR OF THE REIGN OF GEORGE III.**

CASES IN TRINITY TERM,

*Memoranda.*

In the course of the last vacation, Sir *Samuel Shepherd*, Knight, His Majesty's Attorney-General, was appointed Chief Baron of the Court of *Exchequer* in *Scotland*.

*Charles Warren*, Esq. one of His Majesty's Counsel learned in the law, was appointed Attorney-General to His Royal Highness the Prince of *Wales*, and Chief Justice of *Chester*, on the resignation of Mr. Serjt. *Copley*. And

*William Draper Best*, Esq. received the honor of Knighthood, on having been appointed one of the Justices of the Court of *King's Bench*.

## GARDNER v. HARDING and Others.

1819.

A CASE, of which the following is the substance, was directed by the Master of the Rolls, for the opinion of the Judges of this Court, by his decree, dated the 7th of May, 1818:—

*Stanley Gardner*, deceased, being seised in fee-simple of the estate and premises at *Sudbury-Harrow*, hereinafter mentioned, made his last will and testament in writing, duly executed and attested to pass freehold estates, in the words following, that is to say:—"I bequeath to my brother *James Gardner*, of *Sudbury-Harrow*, in the County of *Middlesex*, my freehold estate, consisting of thirty acres of land, more or less, with the dwelling-house, and all erections on the said farm, situated at *Sudbury-Harrow*, in the County of *Middlesex*, now in the occupation of my brother *James Gardner*, above mentioned." The testator afterwards bequeathed his personal property to his said brother *James*, and divers other relations, viz. his nephews and nieces, and died seised of the same estate, in the said freehold estate and premises at *Sudbury-Harrow* aforesaid, whereof he was seised, as at the time of making his said last will and testament, and without having in any respect altered or revoked the same; and leaving the plaintiff *James Gardner*, the devisee of the said estate and premises at *Sudbury-Harrow* aforesaid, surviving. The question for the opinion of the Court, was, "What estate did *James Gardner*, the devisee, take under the devise in the said will, of the estate at *Sudbury-Harrow*?"

Devise "to my brother *J. G.* of my freehold estate, consisting of thirty acres of land, more or less, with the dwelling-house, and all erections on the said farm, situated at *Sudbury-Harrow*, in the County of *Middlesex*, now in the occupation of *J. G.*," passes an estate in fee simple.

1819.

GARDNER

v.

HARDING  
and Others.

The case came on for argument in the course of the last term, when

Mr. Serjt. *Copley*, for the plaintiff as devisee, insisted, that he took an estate in fee, although it would be contended for the defendants, that he took merely an estate for life. The general principle applicable to this case, was laid down by Lord Chief Justice *Gibbs*, in that of *Randall v. Tuchin* (a), where his Lordship said, "The word *estates* is used in the operative part of this devise; it is not introduced incidentally, as in the case of *Doe, d. Bates v. Clayton* (b), after the devise had been perfected, but forms part of the devise itself, and is the thing devised. It is admitted very properly by the counsel for the plaintiff, that the word *estate* or *estates* will carry a fee, unless the other parts of the will restrain the effects of it. Formerly, a narrower construction prevailed, and it was held, that if the word *estate* was attended by words, designating the thing devised, or its situation, it was to be considered, not as descriptive of the *interest* intended to be passed, but only of the lands themselves, which were the subject of the devise. Latterly, however, a more liberal construction has been adopted; and the word *estate*, though it be followed by words which point at the situation, or at the particular house or land, has been held to convey a fee simple. It *may* be restrained:—it *may* be shewn by other parts of the will, that this testator has used the word *estate* as descriptive only of the thing devised, and not of the interest meant to be conveyed; but then it lies on the party who contends for this narrow construction, to shew that there are such words of restraint in the will."—The words here are, "My freehold *estate*, consisting of thirty acres of land, more or less, with the

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(a) 2 *Marsh.* 119. S. C. 6 *Taunt.* 410.—(b) 8 *East.* 141.

dwelling-house, and all erections, on the said farm, situated at *Sudbury-Harrow*, in the County of *Middlesex*, now in the occupation of my brother *James Gardner* above mentioned." The word *estate* is used in the operative part of the devise, and is therefore of itself sufficient to carry a fee, and is not cut down to a life estate, by describing it to consist of thirty acres of land at *Sudbury-Harrow*. The latter terms merely designate the quantity and local description of the property. In *Roe, d. Child v. Wright* (a), the testator devised to his grandson "all his estate, lands, &c. known and called by the name of the Coal Yard, in the parish of St. Giles, London;" and it was there contended, that by the devise of all the estate, &c. only a life estate was conveyed, because the effect of "all the estate" was restrained and qualified by those words which followed, and which were to be understood as merely descriptive of the name and local situation of the subject of the devise, and not of the devisee's interest therein. The same argument may be applicable here; but why did the testator introduce the word *estate*, if he meant to pass a life interest only? That word has the most comprehensive operation, and shews the extent of the interest intended to be conveyed. That case is not to be distinguished from the present; and Lord *Ellenborough* there said (b), after commenting on the arguments, "that he could not but consider that the words '*lands, &c.*' which followed the word *estate*, as descriptive only of the subject-matter, in which the general interest predicated before by the word *estate* consisted; and as tantamount to 'all my estate in lands, &c.' or to 'all my estate in lands, houses, or whatever else it may be;' and between the words 'all my estate, lands, &c.' in this case, and the words 'all my land and estate.' In the case of *Barry v. Edgworth* (c), there

1819.  
GARDNER  
v.  
HARDING  
and Others.

(a) 7 East. 259. — (b) *Id.* 267, 8. — (c) 2 P. Wms. 523.



1819.  
 GARDNER  
 v.  
 HARDING  
 and Others,

seems to be no material difference in point of reason and effect, so as to require a different construction. The *vice* of the plaintiff's construction is, that *estate and lands, &c.* must be made to mean the same thing as *lands* only, in order to defeat the effect of the word *estate*; whereas, according to the defendant's construction, each word will have its proper signification; namely, the word *estate*, as expressive of the entire interest; *lands*, as expressive of the particular subject-matter, or particular kind and quality of the thing in which such entire interest subsists. Supposing, therefore, that the proper and natural effect of the word *estate* is not restrained by the words *lands, &c.* which immediately follow it, the only remaining question will be, whether it be so restrained by the words '*called or known by the name of the Coal Yard, in the parish of St. Giles?*' But if those words be applied to the word '*estate*,' standing in its general and unrestricted sense, they will collectively amount to no more than this; *viz.* 'all my estate in the lands, &c. in *St. Giles's* parish, called the *Coal Yard*.'—His Lordship therefore thought, that the word *estate* in the will in that case, must be construed, as though the latter words had been omitted altogether. So, here, the testator devised all his estate, and added the latter words as a mere definition of the property. It is true he has used the expression, "consisting of thirty acres;" but those words cannot be contradistinguished from those of "called and known by the name of the *Coal Yard*," in the case of *Roe, d. Child v. Wright*. Although in *Pettitward v. Prescott* (a), the Master of the Rolls thought that the words "*consisting of*" being added to a devise of an estate at *Putney*, cut it down to a life estate, yet his decision in that case is clearly

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(a) 7 Ves. Jun. 546,

wrong; and Lord Chief Justice Gibbs, though he did not expressly allude to it in *Randall v. Tuchin*, must yet have had it in his recollection, when he said, that "formerly a narrower construction prevailed, but that latterly a more liberal construction had been adopted."

The case of *Pettisward v. Prescott*, was anterior, in point of date, to those of *Roe, d. Child v. Wright*, and *Randall v. Tuchin*, and directly contrary to the principles established by those latter decisions, as by them a more liberal construction has been adopted. The learned Serjeant also referred to *Uthwatt v. Bryant (a)*, and *Denn, d. Richardson v. Hood (b)*.

1819.  
GARDNER  
v.  
HARDING  
and Others.

Mr. Serjt. Blosset, *contra*, agreed with the principles established by the cases of *Roe, d. Child v. Wright*, and *Randall v. Tuchin*, but denied their application to the present. Two meanings may be given to the word "estate;" first, the legal interest a person may have in particular lands, or what estate he has in the premises; and secondly, its popular sense, which does not advert to interest, but applies only to the lands themselves. Whether an estate be large or small, it would, in its popular sense, be considered as to size only, and not to the interest an individual may have in it, and most men would so consider it. Here, the testator did not mean it in a technical sense, to give an estate in fee or for life, but meant to use it in its popular sense, namely, to express the extent and locality of the property, and not the interest he intended to pass. His meaning is not to be derived from other parts of his will, but must be principally confined to that sentence alone, in which he devises the estate in question to the plaintiff, and which must be construed in a restrictive sense, as applicable only to local

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(a) 2 Marsh. 30.—(b) *Id.* 359.

1819.  
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 GARDNER
 v.
 HARDING
 and Others,

description, and not to the interest of the estate. He did not express whether he devised it in fee, in tail, or for life, but merely that it consisted of thirty acres, situate at *Sudbury-Harrow*, then in the occupation of his brother *James Gardner*. He did not express what interest he was to take, but merely left him the estate he was then in possession of. Did he therefore mean to leave him an estate in fee, or a life estate of the premises he then occupied? In *Pettward v. Prescott* (a), the words of the devise were very nearly similar to the present, as the testator there gave the plaintiff his copyhold estate at P., consisting of three tenements, and those under lease to A. B.; and the Master of the Rolls there held, that an estate for life only passed; and that decision is precisely the reverse of the doctrine laid down by Lord *Ellenborough*, in *Roe, d. Child v. Wright*; for his Honour in the former case said (b), "At an early period, it was doubted, whether the word 'estate' merely, was to be applied to the land only, or to the interest in it. It has long been settled, that it is of itself sufficient to carry the fee. But when words of locality, as 'in' or 'at' a particular place, are added, the question is, whether they do not narrow and restrain the import of that word. So lately as Lord *Talbot's* time, this was a subject of doubt and controversy. In *Ibbetson v. Beckwith* (c), it was strenuously argued, that under a devise of 'all my estate' nothing passed but an estate for life. It does not appear from the report, but is stated in a note in *Peere Williams* (d), that that case first came on at the Rolls, where it was held, that the devisee took only an estate for life. Lord *Talbot*, however, was of opinion, (as may be collected from his judgment) not that these

(a) 7 *Ves. Jun.* 541. — (b) *Id.* 545. — (c) *Forrester*, 157. (d) 2 *P. Wms.* 337.

words of themselves necessarily imported a fee, but that upon the whole will, it was sufficiently apparent, that the deviser meant a fee to pass. Some years afterwards, *Goodwyn v. Goodwyn* (a) occurred before Lord *Hardwicke*, who expressed much doubt whether the estate passes in fee by force of the words 'all my estates.' The question remained undecided; and no case, very nearly resembling it, has since received a decision. But both Lord *Mansfield* and Lord *Kenyon* have stated opinions similar to that to which Lord *Hardwicke* appears to have inclined; the former in *Hogan v. Jackson* (b), and in *Fletcher v. Smiton* (c), Lord *Kenyon* said, 'There are cases, in which nice distinctions have been taken between a devise of an estate at such a place, and a devise of an estate in a particular place; and Lord *Hardwicke* alluded to it in the case cited in *Vesey* (d); but he added, that there is no case in which it was held, that a fee passed by the devise of an estate, if the testator added to it, in the occupation of any particular tenant. And I admit that the word 'estate' may be so coupled with other words as to explain the general sense in which it would otherwise be taken, and confine it to mean *farms and tenements*. But that is not the present case: no such words are here superadded to 'estates.'" In *Pettward v. Prescott*, the Master of the Rolls said, that it had been long settled, that the word *estate* was of itself sufficient to carry a fee, unless its import be restrained by words of locality. From *Goodwyn v. Goodwyn*, which was decided in 1748; to that case which was decided in 1802, there are the concurring judgments of Lords *Hardwicke*, *Mansfield*, and *Kenyon*, and Sir *William Grant*, that the word

1819.

GARDNER
v.
HARDING
and Others.

(a) 1 *Ves. Sen.* 226.—(b) *Coup.* 299.—(c) 2 *Term Rep.* 658.—(d) 1 *Ves. Sen.* 228.

1819.

GARDNER

v.

HARDING
and Others.

"estate" will not carry a fee, when it is restrained and confined to mere local description, or is stated to be in the occupation of a particular tenant. The Master of the Rolls, in the conclusion of his judgment in the case of *Pettward v. Prescott*, said, "The question here is, whether the superadded words do not clearly shew the deviser did not mean to speak of the quantity of his legal interest, but merely the *corpus* or subject, in the disposition? I am of opinion, they do. The words are not 'all my estate,' but 'my copyhold estate at Putney, consisting of three tenements,' &c. that is, 'the estate I give you at Putney consists of three tenements,' which is the same as saying, 'three tenements compose the estate I give you,' a mere description of the thing, and not of his interest. That he meant to give the houses absolutely, there is little doubt. So a testator generally does, when giving under any description. But we must look at what he says, not at what he thought." The doctrine, therefore, of Lord Hardwick, in *Goodwyn v. Goodwyn*, having been recognized and adopted by Lord Kenyon, in *Fletcher v. Smiton*, is a sufficient authority to support the case of *Pettward v. Prescott*, which is precisely in point for the defendant. The case of *Randall v. Tuchin* (a) is inapplicable, as there the testator devised copyhold estates to his niece for life; then to her son B.; estates therefore was the operative word in that case; and those which were added restricted it to the designation of interest; but here estate is not the operative word; nor did the testator mean what interest should pass; and Mr. Justice Heath, in *Randall v. Tuchin* (b), said, "The principle is, that where the word 'estate' is found in the operative part of the will, it always passes an estate in

(a) 2 Marsh. 113. S. C. 6 Taunt. 410.—(b) 2 Marsh. 120.

fee, unless qualified by other words, the best way to try whether it be operative or not, is to strike it out, and see whether the sense be kept up without it; which test being applied to the present case, the passage would be nonsense without it." Here it would not be so; as there is a devise of thirty acres of land, which is perfect without the word "estate," which may therefore be considered as inoperative. The case of *Roe, d. Child v. Wright* (a), does not advance the argument for the plaintiff more than that of *Randall v. Tuckin*; for, in the former, Lord *Ellenborough* said (b), that "the vice of the plaintiff's construction was, that estate and lands, &c. must be made to mean the same thing as lands only, in order to defeat the effect of the word 'estate;' whereas, according to the defendant's construction, each word would have its proper signification, namely, the word 'estate,' as expressive of the interest, 'lands,' as expressive of the particular subject-matter, or particular kind and quality of the thing in which such entire interest subsists;" the foundation of his Lordship's judgment, therefore, was that the words "estate" and "lands" expressed two different things; that the one was applicable to interest only; the other as having reference to local description. The word "estate" there was used before that of "lands," and the description of locality applied to the latter only, which were not to be transposed or rejected to defeat the intention of the testator.

1819.
GARDNER
v.
HARDING
and Others.

Mr. Serjt. *Copley*, in reply, admitted, that the case of *Petteward v. Prescott*, was in terms very similar to the present, and that unless it were outweighed by subsequent authorities that the doctrine there laid down must prevail.

(a) 7 East. 259.—(b) *Ibid.* 267.

1819.
GARDNER
v.
HARDING
and Others.

But that the later cases established a principle which was similar to, and decisive of the present. It is true that the word "estate" may be used either in a technical or popular sense, but by legal principles it must be taken in its technical sense, unless it appear to be the intention of the testator that it should not be so. It has been said, that the *onus* of shewing the intention of the testator is on the party who contends that "estate" should be used in the popular sense. No other parts of the will bear on the present question. By the addition of the words, "consisting of thirty acres, &c. situate at *Sudbury*," the legal estate was not restricted or controlled; they were introduced not to narrow the estate, but to describe its local situation. If it had been described as an estate at *Sudbury*, it is quite clear that it would have passed a fee. It has, however, been contended, that an estate, which is a mere interest in the property, cannot be called thirty acres, and that interest cannot apply to land. It has been also said, that the word "estate" might be struck out. But why was it used by the testator? It is quite clear that estates and lands are not applicable to the same thing. In *Randall v. Tuchin*, Mr. Justice *Heath* merely said, that the best way to try whether the word "estates" were operative or not, was to strike it out of the will, and see whether the sense could be kept up without it. If it could not, the word "estate" would be expressive of interest, but if the sentence convey sense without that word, still there is no reason to restrain the effect produced by its introduction, or to strike it out altogether. The word "estate" being introduced here may be rendered operative, and construed to give effect to the interest the testator intended to convey by the subsequent words of the devise. The principles by which this case must be governed, are those laid down in *Roe, d. Child v. Wright*, and *Randall v. Tuchin*; and although *Pettitward*

v. *Prescott* be similar in terms, yet it cannot be reconciled with those latter decisions.

Lord Chief Justice DALLAS remarked, that it was very extraordinary that that case should neither have been referred to in the arguments, nor noticed by the Courts, in either of the later decisions.

1819.
 ~~~~~  
 GARDNER  
 v.  
 HARDING  
 and Others.

*Cur. adv. vult.*

The following Certificate was afterwards sent to the Master of the Rolls.

This case has been argued before us by Counsel.—We have considered it, and are of opinion that *James Gardner*, the devisee, under the devise in the will of *Stanley Gardner*, deceased, of the estate at *Sudbury-Harrow*, takes an estate in fee-simple.

R. DALLAS.  
 J. A. PARK.  
 J. BURROUGH.  
 J. RICHARDSON.



1818.

Friday,  
June 11.ROE, on the several demises of FENWICK and POWELL  
v. DOE.

If a tenant in possession leave this country, and reside abroad, for the purpose of avoiding his creditors, and the premises be charged with an annuity to the lessor of the plaintiff, to whom a right was reserved to enter, receive the rents, and sell: judgment cannot be obtained against the casual ejector, on an affidavit that a declaration was duly served on the premises, and a copy thereof affixed to the outer door; nor can the service of the declaration on the solicitor of such tenant be deemed good, unless he resided abroad for the express purpose of avoiding such service.

MR. Serjt. *Taddy* moved for judgment against the casual ejector in this case, on affidavits which stated that the tenant in possession had resided at *Calais* since the beginning of the year 1818, and that in the course of a negotiation which was pending between the solicitors for the lessors of the plaintiff, and the tenant, with a view to effect an amicable arrangement for the redemption of an annuity of £1,200, with which the premises were chargeable to one of the lessors, several letters were received from the tenant, dated from *Calais*, in which he acknowledged that he was residing there for the purpose of avoiding his creditors, and that he was afraid to return to this country, unless he could obtain a letter of licence from them for that purpose. That in the indenture, charging the property, an express right was reserved to one of the lessors to enter upon the premises, and receive the rents for the better securing the annuity, and that the tenant, by indentures of lease and release, had conveyed the premises to the other lessor in trust, to be sold for that purpose; and that several instalments of the annuity were now in arrear. It was also sworn, that a copy of the declaration was duly served on the premises, on a servant who was left in charge thereof, and that at the same time another copy was affixed to the outer door of the dwelling-house. The learned Serjeant observed, that there had been a case in the Court of *King's Bench* where a similar application had been granted, in which a foreign nobleman had married here, and afterwards gone abroad. But,

The Court, considering this to be entirely a novel application, and the secondary reporting that there never before had been a similar motion, it was refused.

1819.  
ROB,  
d. FENWICK  
v.  
DOE.

Mr. Serjt. *Taddy* then moved for a rule nisi, that service of the declaration on the tenant's solicitor might be considered as good service, and observed that it had been frequently granted when a party had absconded, for the purpose of avoiding process. But,

The Court were clearly of opinion that as it did not appear on the face of the affidavits that he resided abroad for the purpose of avoiding the particular process in this action; and as this was an application *prima impressionis*, it was untenable, and as the premises were conveyed to one of the lessors and his heirs, in trust, for sale, that the proper remedy was to have recourse to a real action.

The learned Serjeant therefore took nothing by either of his motions.



\_\_\_\_\_, Demandant, \_\_\_\_\_, Tenant.  
BRADLEY, Vouchee.

Friday,  
June 11.

MR. Serjt. *Vaughan* moved to amend this recovery by inserting the christian name of *Spiller* between those of *William* and *Bradley*, on an affidavit, which stated that the vouchee was baptised by the name of *William Spiller Bradley*, and that he was in the habit of signing his name as *William Bradley* only, and had so done to the present recovery; he observed that the Court had before granted a similar application in the course of the last term.

If a vouchee sign a recovery with one part of his christian name only, the Court will not permit the other part to be added.

1819.

BRADLEY,  
Vouchec.

Lord Chief Justice DALLAS. The amendment in that case was allowed on the production of an extract from the register in which the name of baptism was contained. As the Court are of opinion that this amendment is unnecessary, the application must be

Refused.

Friday,  
June 11.

DOE, on the demise of ELWOOD v. ROE.

Service of declaration in ejectment, on one of the tenants in possession, with another service on that tenant for the other, and an explanation given, is not good.

Mr. Serjt. *Vaughan* moved, that the service of declaration in this case might be considered good;—he grounded his motion on an affidavit which stated, that there had been a personal service on *Elizabeth Robinson*, one of the tenants in possession, and at the same time an explanation given to her, and a service of declaration on her for her brother *David Robinson*, who was the other tenant;—this, the learned Serjeant contended, amounted to a service on him. But,

*Per Curiam*.—You do not swear that the declaration was ever served on the brother, or came into his possession.

Refused.

Friday,  
June 11.*Ex parte* CHRISTIAN.

Where a country attorney has

continued to practise two years after his agent has negligently suffered his certificate to expire, although remittances were made by such attorney for the purpose of renewing it; the Court will re-admit him on payment of his arrears, without a term's notice.

Mr. Serjt. *Blosset* moved, that the applicant, who was practising as an attorney at *Norwich*, might be re-admitted

an attorney of this Court, without giving a term's notice, on payment of the arrears due for his certificate. The motion was grounded on an affidavit, which stated, that Mr. *Christian* had for many years employed an agent in town, to whom he had regularly remitted money to the amount of his agency bills and the expences of his certificate, but that owing to the negligence of such agent, the certificate had not been taken out for the years 1818 or 1819. He relied on the cases of *Ex parte Dent* (a), and *Ex parte Winter* (b), where the Court of King's Bench had granted similar applications, observing, in the former case, that "There was not any rule of Court requiring the notice, but that it was a term usually affixed to applications of that sort—that it seemed, however, reasonable to dispense with it there, the party having continued to practice unconsciously."

1819.  
*Ex parte*  
 CHRISTIAN.

*Per Curiam.* As the affidavit is full as to Mr. *Christian's* ignorance of the money not being applied to the taking out of his certificate, we feel that this application may be safely granted upon the authority of the cases cited.

Granted.

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(a) 1 Barn. & Ald. 189. — (b) *Ibid.* 190.

MALCOLM v. DAY.

Tuesday,  
 June 15.

MR. Serjt. *Pell*, in the last term, had obtained a rule *nisi* for an attachment against a witness for not obeying a subpoena served on him, he attend in Court, and during the opening of the plaintiff's cause, thinking he is not able to prove a particular fact, he leave the Court, and the plaintiff is nonsuited for want of evidence. A witness is liable to an attachment, if,

1819.  
MALCOLM  
v.  
DAY.

subpoena to give evidence in a cause which was tried at the last assizes at *York*, on an affidavit which stated that he was in Court on the day of the trial, and that having heard the plaintiff's case opened, he immediately left it, and did not return afterwards, in consequence of which the plaintiff was nonsuited, but it not appearing in the affidavit that he was called on his subpoena, the Court ordered it to be amended in that respect, and the rule was accordingly enlarged until this day, when

Mr. Serjt. *Lens* shewed cause, on an affidavit, which stated, that an action had been brought against the defendant, for having advised the plaintiff to take an annuity on a title which had turned out to be defective, and the only question in the cause was, whether the defendant had communicated to the plaintiff that there were any prior incumbrances on the property before the annuity was granted, and the witness subpoenaed was to prove that no communication of that sort was made, that the witness remained in Court during the opening of the plaintiff's case; and that having heard it, and knowing that he could not support the fact for which he was subpoenaed, and stated to be enabled to prove, he left the Court; that the plaintiff's attorney wished to warp his testimony, and promised to send £20 to his wife, which the attorney admitted, but said, that he did not intend to send it, but offered it merely to induce the witness to stay to be examined; under these circumstances, therefore, the learned Serjeant insisted, that an attachment ought not to issue, and that if the plaintiff had sustained any damage from the non-attendance of the witness, he might have his remedy by action; and that even if the witness had appeared and given his testimony, the plaintiff would have been nonsuited, as the witness himself was fully aware that he could not prove the facts for which he had been subpoenaed.

Mr. Serjt. *Pell*, in support of the rule, was stopped by the Court.

1819.

MALCOLM

v.  
DAY.

Lord Chief Justice DALLAS. The witness certainly ought not to have left the Court, and no satisfactory reason has been assigned for his having so done; it appears that he heard the Counsel for the plaintiff open the cause, and having learnt that he was to be called for the purpose of proving that no communication had been made to the plaintiff of prior incumbrances on the property on which an annuity had been granted, he immediately left the Court. It is our duty to watch over the administration of justice, and when a witness is required to give evidence at a trial on a subpoena, his attendance must be enforced, and cannot be dispensed with, but in cases of the most urgent necessity.

Mr. Justice PARK. If this were an application for an information, it would admit of a very wide distinction; the witness has been guilty of a contempt in not obeying the process of the Court, and I therefore think he is liable to an attachment.

Rule absolute (a).

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(a) Mr. Justice *Burrough* and Mr. Justice *Richardson* were absent.

1819.

Tuesday,  
June 15.

Lord RIVERS v. PRATT and another.

In trespass for breaking and entering the plaintiff's chace, and killing his deer; this Court will not grant a trial at bar, although the question to be tried was to ascertain the boundaries of the chace; and although ancient and documentary evidence as well as considerable living testimony was necessary to fix such boundaries: on the ground, that a cause involving similar rights had been lately brought by the same plaintiff against another defendant, in which the latter had obtained a verdict, and which the Court of *King's Bench*, after argument, had refused to set aside or grant a new trial.

THIS was an action of trespass.—The declaration stated that the defendants broke and entered the chace of the plaintiff called *Cranbourne Chace*, and killed his deer therein. The defendants pleaded not guilty—on which issue was joined, and the cause stood in the ordinary course for trial, at the next assizes for the County of *Wilts*; and the question intended to be tried, was the extent of the boundaries of *Cranbourne Chace*, and whether certain lands in the parish of *Tollard Royal*, in the County of *Wilts*, were within it.

In a former case where the plaintiff had brought a similar action against another defendant, after a long trial, the Jury decided, that certain lands in the parish of *Alce-diston*, in the County of *Wilts*, were not within the chace in question; and although a new trial was afterwards moved for in the Court of *King's Bench* yet that Court were perfectly satisfied with the finding of the Jury, and refused the application.

Mr. Serjt. *Lens*, in the course of the last term, had obtained a rule *nisi* for a trial at bar, in the next *Michaelmas* term, by a special Jury of the County of *Wilts*. He observed that the question was one of very great importance, not only to the plaintiff, but to the proprietors and occupiers of land within the boundaries of *Cranbourne Chace*; that the documentary evidence affecting the same commenced from a period of very great antiquity, and was extremely voluminous and complicated; that

the true construction of many of the documents depended upon a right understanding of principles of law; and that there were many questions of great intricacy, as well in point of law as of fact. If they embraced a mere simple question of law, it might be more convenient to try it either on a special verdict, or by a bill of exceptions: but even a special verdict could not decide the point in question, as, if the case were accurately stated, the difficulty would be solved. The substantial question intended to be tried, was, the true boundaries of *Cranbourne Chace*, in the Counties of *Dorset* and *Wilts*; two had been ascribed to it, the inward one comprised an extent of about fourteen thousand acres only, while the outward one included a circuit of between three and four hundred thousand acres, and was nearly a hundred miles in circumference. Constant disputes had arisen between the plaintiff, as owner, and the proprietors of lands within the chace; the one, contending that he had a right over the whole space between the two boundaries; the others, that his right did not extend to more than the inward boundary. The forest law cannot be applicable to the present question, neither is it necessary to inquire whether the plaintiff's right be fully constituted, having been so long suffered to remain unmolested. The only doubt is, whether the plaintiff can claim the right of chace to the limits he describes it as extending to. As the Court of *King's Bench* have formed their judgment on this question, a trial at bar is now the only proper course to be adopted. It was supposed by the learned Judge, who tried the former cause, that the space between the two boundaries was *purlicu*, which is said to be the perambulation of a forest disafforested (*a*), over which the owner of land within the *purlicu* has the sole right of pursuing deer

1819.  
  
 Lord RIVERS  
 v.  
 PRATT.

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(*a*) *Stat. 33 Edw. 1.*—4 *Inst.* 308.



1819.  
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 Lord RIVERS
 v.
 PRATT.

by himself and his servants, which escape out of the forest; but the owner of the forest has merely a right to drive the deer, which may be found in the *purlicu*, back again into the forest. This might have been a *purlicu* if the chace had once been a legal forest, and disafforested as to a considerable part of it, provided such chace remained entire within the inner boundary. This difficulty is not to be solved by evidence alone. It appeared at the former trial that there were seven different walks to the chace, guarded by seven different keepers. The term *purlicu* cannot be applied to this case, as it does not appear that the outer ambit, and the perambulations and grants thereon were added to the ancient chace, and afterwards disafforested by the statute *Carta Foresta*. Lodges are erected for the keepers in different parts of the chace, and *cheminage* is payable during the rutting season, which is collected at a great distance from the interior of the chace, and chace courts are also regularly held. There is a wide distinction between forests and chaces, the one having no courts or officers except for the purpose of taking care of the deer, and the other having judicial rights attached to those courts. At the former trial various documents were produced from the 34 *Hen. 3.* to within two centuries since, to determine the boundaries of *Cranbourne Chace*: all these tended to shew that the space between the two boundaries could not be considered as a *purlicu*, and the doubt now is, whether those lands in the parish of *Tol-lard Royal* be or be not within the chace? This is an unfit question to be tried by a Jury at *nisi prius*; for the plaintiff must either be entitled to the whole of the chace or none; and although the defendants may contend, that he is only entitled to a right in the inner boundary, yet others might assert, that he had no right whatever even within that boundary; but it appeared from the documents of the last half century that the chace existed to the full

extent now claimed by the plaintiff; under all these circumstances, from the difficulties attached to this case, the ambiguity attendant on the construction of so many documents, as well as a multiplicity of parol testimony, the only course that can with propriety be now adopted, is by trial at bar.

1819.

 Lord RIVERS
 v.
 PRATT.

Mr. Serjt. *Pell* now shewed cause.—The question to be now determined, is not, what are the boundaries of *Cranbourne Chace*, but merely whether *Tollard Royal*, in the County of *Wilts*, in which the trespass was committed, be within it? In *Wood v. Budden* (a) it was determined, that no part of *Tollard Royal* was within *Cranbourne Chace*. This point therefore might be tried at *nisi prius*, before a Jury who would be fully competent to determine its merits, and although the question may be of great importance to the plaintiff, although many witnesses may be necessary to be examined, and the value or magnitude of the property may be considerable, yet those reasons alone are not sufficient for the Court to grant a trial at bar, the allowance of which is wholly within their discretion. It is a question for a Jury rather than a Judge; for it contains no complicated or difficult point of fact nor of law: for, on the former trial, this point was in effect determined, and the present case cannot be put in a different way, nor can any new evidence be introduced; and on an application there for a new trial, the Court of *King's Bench*, entertaining no doubt upon the point, refused to have the verdict reviewed, or a new trial granted, as the same rights must be then re-contested between the same parties which had been before properly disposed of. As this case embraces a similar point, and as the case of *Wood v. Budden* has decided that *Tollard Royal* is no

(a) *Hob.* 119.

1819.
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 Lord RIVERS  
 v.  
 PRATT.

part of the chace in question, there can be no ground for this application.

Mr. Serjt. *Lens*, in support of the rule, admitted, that the merits, and the evidence to be adduced, were not of themselves sufficient causes for a trial at bar; nor was the mere magnitude of the question, or value of the property, enough to call upon the Court to grant it. The real question now to be tried formed no part of the case which was formerly tried by the present plaintiff; for the learned Judge, who tried that cause, solved the whole of the difficulty by supposing that the space between the two boundaries came within the denomination of *purlieu*; but the original boundaries themselves formed no question in that case, the solution was perfectly new, and to make it a *purlieu*, it must be inferred, that the outer boundary was originally a forest, afterwards reduced to a chace, and that that boundary, though disafforested, might still be considered as the *purlieu*, or part of the forest. This is a most important fact, the assumption of which cannot be borne out by evidence, if it could, a special verdict might answer all the purposes of a trial at bar; but the former must contain all the evidence, both documentary and parol, which would be mixed up equally with law and fact, and the effect of it would be to put either one party or the other entirely out of Court. If the special verdict were drawn improperly, the House of Lords would award a *venire de novo*. So a bill of exceptions must contain all the evidence, and the effect of it would be to take the cause out of this Court to that of the *King's Bench*, who would, in all probability, remain of the same opinion as before. If the *locus in quo* cannot be considered as *purlieu* according to the old authorities, and the statute *De Carta Forestæ*, then this chace remains entire, which has always been described as a chace, and not a forest; and

the owner has always exercised his rights and privileges accordingly. As such chaces were established antecedent to the passing of *Carta Foresta*, whether the *locus in quo* be a chace or not, is now to be decided. No application was made for a trial at bar in the former cause, because the question as to this space being a *purlieu* or not was not then considered, which being now added to such a body of evidence, and circumstances so complicated, this application is the only means by which a fair and impartial inquiry can be had.

1819.

Lord RIVERS  
v.  
PRATT.

Lord Chief Justice DALLAS.—This is a subject which is certainly extremely extensive in its nature, and I do not intend to under-rate the difficulties belonging to it; but its merits lie in a narrow compass. An application for a trial at bar is always in the discretion of the Court, and is to be governed by circumstances. I cannot say, with any precision, what circumstances will entitle a party to such an application, yet it is quite clear that the following rule is applicable to all cases of this nature, namely, that they are not to be entertained lightly; such a proceeding is not only productive of inconvenience to the Court, but generates delay to the suitors, and is equally inconvenient to the Jurors, who are bound to attend; and it is also productive of heavy expences to the parties; and therefore to entitle a party to succeed on an application of this nature, it is necessary that it should be made on very strong grounds. There is no case similar to the present in circumstances; but we are not called on to consider whether, before trial had on the complexity in fact, or the difficulty in law, we shall now grant a trial at bar. A former trial has been had, in which the same rights were involved, and we are now called on to see whether any thing happened at that trial, or other new circumstances have since transpired to furnish grounds to make it incumbent on us to grant this

1819.  
~~~~~  
Lord RIVERS
v.
PRATT.

application. The fact is, that no application was made in the first instance, because, it is said, no difficulty had occurred until the Judge at the former trial had left it to the Jury to say whether the place where the trespass was committed was within the *purlieu*. Whether the difficulty had occurred before or not, or even if the learned Judge had taken a false view of the subject at the trial, makes no difference, for an application was afterwards made to the Court of *King's Bench*, in which both these subjects could have been discussed. He stated his opinion at *nisi prius*, and solved the difficulty by considering the space between the boundaries as a *purlieu*, which solution my Brother *Lens* has considered as a novelty. But when it fell from the learned Judge, after his report of the trial had been received, and after very able arguments used by Counsel in the Court of *King's Bench* for a new trial, it ceased to be a novelty; and that Court felt so little difficulty in the result that they refused to send the cause to a new trial. On what ground therefore can we now order a trial at bar, when that Court thought that even a re-consideration of the question was unnecessary? It has been said, that if this cause were tried at *nisi prius*, that the Jury would find, as they did in the former, as that verdict had been since sanctioned by the Court of *King's Bench*. But a bill of exceptions may be tendered; and although it may be necessary to state a number of facts therein, yet it will not differ from similar cases; but it has been said, that 'it must be put on record, and go to the Court of *King's Bench*, who would be inclined to support their former judgment. Even if the record go to the *King's Bench*, a writ of error may be brought in the House of Lords, where the judgment must be final. The cause will then be fully heard; and, without adverting to the case of *Wood v. Budden*, I think this rule ought to be discharged.

Mr. Justice PARK.—I perfectly concur with my Lord Chief Justice. All the grounds that have been stated in support of this application are not sufficient to induce the Court to deviate from the common course. The strong and principal point relied on in its support, is the novelty of the point made by the learned Judge at the former trial, as to whether the space between the two boundaries were or were not a *purlieu*. But this application does not now come with a good grace before the Court; for the cause was most fully investigated at the trial in a hearing, which occupied two whole days. When the point first occurred to that learned Judge, the opinion he gave was certainly a novelty; but after it had been reconsidered by the Court of *King's Bench*, after hearing arguments for a new trial, which occupied them between three and four days, it cannot be so deemed. As to any difficulty there may be in this case, it has been removed, or at all events lessened, by that discussion. There was a much stronger ground for a trial at bar in the first instance than now. If the case go back to the Court of *King's Bench* by a bill of exceptions, and they adhere to their former judgment, the most speedy and sure remedy for the plaintiff to adopt, will be by bringing a writ of error to the House of Lords, where the opinion of all the Judges will be given on the subject. My Brother *Richardson* concurs in opinion on the grounds that sufficient reasons have not been given to induce the Court to grant this application, and my Brother *Burrough* not having been present during the argument, declines expressing his sentiments on this occasion.

Rule discharged.

1819.
 Lord RIVERS
 v.
 PRATT.

1819,

Wednesday,
June 16,

BOSWORTH v. BOSWORTH.

The defendant may refer it to the prothonotary, before judgment, to ascertain what is due for principal and interest on a common money bond.

MR. Serjt. *Vaughan*, on the first day of this term, had obtained a rule *nisi*, on the part of the defendant, to refer to the prothonotary to ascertain what was due for principal and interest on a common money bond.

Mr. Serjt. *Onslow* now shewed cause, and insisted, that no reference could be made until after judgment; that this was not a question of computation, and that part of the money might have been paid.

Mr. Serjt. *Vaughan*, in support of the rule, relied on the case of *Farquhar v. Morris* (a), where a motion similar to the present was made.

The Court at first were inclined to think that this application could not be made on the part of the defendant, but, on referring to the secondary, made the rule

Absolute.

(a) 7 Term Rep. 124.

Wednesday,
June 16.

PINCHER v. BROWN.

If a defendant arrested for £15, for goods sold, and be

MR. Serjt. *Vaughan* moved for a rule *nisi*, that the prothonotary should allow the defendant his costs under indebted to the plaintiff in the sum of £14 only, on a promissory note, payable by instalments, the Court will not allow the defendant his costs pursuant to 43 Geo. 3. c. 46., as he might have been arrested on the note.

the 43 Geo. 3. c. 46. s. 3., on the ground that he had been vexatiously arrested. He founded his motion on an affidavit, which stated, that the defendant had been arrested for £15. and upwards, for goods sold and delivered. That the original debt amounted to £15: 17s., and that the defendant had, before the commencement of the action, paid £1: 17s., which reduced the debt to £14; for which sum he gave a promissory note, payable by instalments, at £2 per month. On the production of this note at the trial, the Jury found a verdict for the plaintiff for £14; the learned Serjeant contended, that, as the defendant was held to bail on an affidavit for goods sold, and as the declaration was framed accordingly without any count on the note, that he could not have been liable to arrest, as he was indebted to the plaintiff in £14 only when the arrest took place.

1819.

 PINCHER
 v.
 BROWN.

LORD CHIEF JUSTICE DALLAS.—In order to entitle the defendant to the fruits of the application he now seeks for, the arrest must have been vexatious and malicious, and I think there was no colour for saying that it was so. The defendant was indebted to the plaintiff in the sum of £14, and was arrested for £15 and upwards, but the plaintiff might have brought an action on the note, and the defendant might therefore have been arrested for £10, within the statute, or the plaintiff might have held him to bail for £14, being the sum actually due on the note. As therefore the plaintiff might have arrested him on the note, this alone is a complete and sufficient answer to the arrest being either vexatious or malicious.

MR. JUSTICE PARK.—I perfectly concur with my Lord Chief Justice in thinking that there is a complete answer to the charge of a frivolous or malicious arrest; for the question is not whether the proceedings are perfectly re-

1819.
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 PINCHER  
 v.  
 BROWN.

gular, but whether the defendant might have been arrested on the note; and he certainly could have been held to bail for the sum, not only of £10, but £14, and this case therefore is clearly not within the statute.

Mr. Justice BURROUGH.—The Jury have determined by their verdict, that £14 was due from the defendant to the plaintiff on the note, and I therefore think he is not entitled to this application.

Rule refused (a).

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(a) Mr. Justice *Richardson* was absent.

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Thursday,  
 June 17.

OLIVER and Others, Assignees of ROBERTS, a Bankrupt,  
 v. BARTLETT.

In an action of trover brought by the assignees of a bankrupt for a rick of bark, and of which the bankrupt was the reputed owner, a witness may be asked what was the reputation of the neighbourhood to whom the rick belonged at the time of the bankruptcy,

if it appear that the bankrupt had exercised repeated acts of ownership over it previous to that time.

THIS was an action of trover brought against the defendant under an order made by the Lord Chancellor, upon the petition of the plaintiffs, as assignees of *Roberts*, a bankrupt, to recover the value of a rick of oak-bark, standing at *Whaddon Chase*, of which it was alleged the bankrupt was the reputed owner at the time of his bankruptcy.

At the trial of the cause before Mr. Baron *Graham*, at the last assizes at *Aylesbury*, a verdict was found for the plaintiffs with £2000 damages, subject to be reduced out of Court as to the value of the bark. The facts, as appeared in evidence, were these; the commission against the bankrupt, dated the 28th of *April*, 1817, the

1819.  
  
 OLIVER  
 v.  
 BARTLETT.

assignment dated in the month of *May* following, and the order of the Court of Chancery, were severally put in and admitted. The evidence produced by the plaintiffs was confined principally to the reputation of ownership, the witnesses being the persons employed by the bankrupt to gather and stack the rick. It appeared that he had purchased the bark in 1815. The first witness stated, that he was employed by the bankrupt in that year to draw and stack the bark in question, and that he was paid by the bankrupt, who was a tanner, and who gave all the directions respecting it; that in *February* 1817, he was ordered by the bankrupt to repair the thatch of this stack after a storm, but that he did not do it, and that on his meeting the bankrupt some time afterwards, and being asked whether he had repaired it, he told him that he had not, but had recommended another person to him for that purpose. On this witness being asked by the plaintiff's counsel, how he knew this rick belonged to the bankrupt, he stated, by report only; and on being further asked, what was the reputation of the neighbourhood, as to whom the rick belonged at the time of the bankruptcy, the question was objected to by the defendant's counsel, upon the ground that the reputed ownership must be gathered from facts, and not by an answer to a question put in so general terms. The case of *Gurr v. Rutton* (a) was relied on by the plaintiffs, where Lord Chief Justice *Gibbs* had admitted, not only evidence of reputation, but testimony to contradict it,—the learned Judge, in deciding that the question was properly put, stated, that he thought the evidence was introduced of necessity, if not, it would be to reject the words "reputed owner," and consider a bankrupt only as such owner as would be shewn to be reputed by the acts of ownership, possession, order, and disposition mentioned in the statute

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(a) 1 *Holt's Rep.* 327.

1819.

OLIVER

v.

BARTLETT.

21 *Jac. 1. Cap. 19.* The witness then answered, that the bankrupt was considered the owner of the rick by every one up to the time of the bankruptcy, and then added, that he gave the bankrupt credit considering him to be the owner;—For the defendant, the bankrupt, who was his son-in-law, stated, that he was employed by the former before 1815, to purchase bark for him in *Whaddon Chace*, and that his father-in-law had purchased and paid for the bark in question more than a twelvemonth before the act of bankruptcy took place, but no evidence was produced to shew that he had ever taken possession, or exercised any act of ownership over the stack in question; the learned Judge left it to the Jury to say, whether the bankrupt, having been the original owner of the bark, continued to be so reputed to the time of his bankruptcy; and if so, to find a verdict for the plaintiffs; if not, that the defendant would be entitled to recover. The Jury found a verdict for the plaintiffs.

Mr. Serjt. *Blosset* having in the last term obtained a rule *nisi*, that this verdict might be set aside, and a new trial granted, on the ground that the question of reputed ownership was improperly put and admitted in evidence at the trial.

Mr. Serjt. *Lawes* was on this day about to shew cause against the rule,—when

Mr. Serjt. *Blosset* (with whom was Mr. Serjt. *Len*) were called on by the Court in its support; they insisted, that evidence of reputation was not admissible in that stage of the trial in which it was offered, and observed, that this was not merely common evidence of reputation, but that the foundation must be laid by antecedent matter.—The single point on which the question turns, is the

21 Jac. c. 19. s. 11 (a), which clause only applies to goods sold by the bankrupt, but does not extend to those held by him, or which had been put into his hands by other individuals; that clause only entitles the commissioners to take that property of the bankrupt which he might have in his hands as reputed owner. The evidence at the trial should have been confined to the bankrupt's actual possession, and not extended to that of reputation. The words "reputed owner" used in the statute, are merely to distinguish such owner from the real one. Possession, as reputed owner, ought to be proved by specific acts, and the only question is, whether the bankrupt, as reputed owner, had consent of sale given him by the real owner; he might have had the disposition of the property as agent, factor, or partner; evidence might therefore have been given of acts of ownership, as apparent owner, and whether the bankrupt exercised the order and disposition; but the general rule as to the admissibility of evidence and reputation, are diametrically opposite to the effect intended to be given by this statute. The facts of the case of *Gurr v. Rutton* (b) are wholly distinguishable from the present. Lord Chief Justice Gibbs there said, "The Jury must look to the facts on which the opinions on both sides were formed." It is impossible for one man to form an opinion on facts which

1810.  
OLIVER  
v.  
BARTLETT.

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(a) By which it is enacted, "That if at any time thereafter, any persons shall become bankrupt, and at such time as they shall so become bankrupt, shall, by the consent and permission of the true owner and proprietary, have in their possession, order, and disposition, any goods or chattels, whereof they shall be reputed owners, and take upon them the sale, alteration, or disposition, as owners, that in every such case the commissioners, or the greater part of them, shall have power to sell and dispose of the same, to and for the benefit of the creditors which shall seek relief by the commission, as fully as any other part of the estate of the bankrupt."

(b) 1 Holt's Rep. 327.

1819.  
  
 OLIVER  
 v.  
 BARTLETT.

are only wholly known to another, and existing facts cannot be coupled with evidence of reputation; the evidence in this case, therefore, should have been confined to circumstances of ownership proved by facts, and not merely by belief or reputation; when the jury should have judged from those facts alone, and have drawn their conclusion accordingly.

Lord Chief Justice DALLAS.—It seems to me, that this case has nothing to do with the rules of evidence applicable to reputation or hearsay, but whether the question put at the trial were admissible or not, depends entirely on the construction of the 11th section of 21 Jac. 1. c. 19. which is alone connected with it. It has been said, that the object of that statute is, to distinguish between real and reputed ownership, and so it is, for its principal object is, that if false credit be given to a person as reputed owner, who exercises a power over property, he shall be taken as a real owner, to put such property into the hands of his creditors. The clause in question enacts, that, “If any persons, at such time as they shall become bankrupt, shall, by consent and permission of the true owner and proprietary, have in their possession, order, and disposition, any goods and chattels.” The consent and permission of the owner is not to be proved by positive evidence, but inferred by the possession of the property, connected with the order and disposition over it, making it incumbent on the other party to prove that such order was exercised without his consent as owner. If, therefore, the bankrupt be merely a reputed owner, still, having exercised acts of disposition over the property, he must be considered as a real one. But then the immediate following words in that clause are, “whereof they shall be reputed owners, and take upon themselves the sale, alteration, or disposition as owners.” The word “reputed” is the most emphatic word of the statute, being introduced to compare and contrast the

real with the apparent owner; how can it be ascertained that a person is a reputed owner, except by the evidence of his neighbours? Whether, if the question of reputation had not been put, it might have been proved by other evidence, it is not necessary now to examine, for the statute enacts, "whereof the bankrupt is the reputed owner." Whether he be the real owner or not, therefore, is entirely out of the question; but the single point is, whether the party be or be not the reputed owner. I think that is a question necessary and proper to be put. But it was proved here, that the bankrupt had the original disposition of the property, and afterwards exercised a reputation of ownership. Cases of this description depend on their own peculiar circumstances, and the main difficulty that generally arises, is to ascertain who is the reputed owner, and whether, from his order and disposition of the property, he be so in fact or not. This is rather a question of fact than of law, as was observed by Mr. Justice *Buller*, in *Walker v. Burnell* (a), and recognised by Mr. Justice *Lawrence*, in *Horn v. Baker* (b). So Lord *Ellenborough*, in *Muller v. Moss* (c), confirming the doctrine of both these learned Judges, said, "reputed ownership is a fact which ought to have been found in order to raise the question;" and in the previous case of *Lingham v. Biggs* (d), Lord Chief Justice *Eyre* concurred with Mr. Justice *Buller*, and said, that "when it was once ascertained whether the bankrupt was the reputed owner or not, there would be very little difficulty in deciding; for that, from reputed ownership, false credit arose, to remedy the mischief of which, the statute applied, and the other terms of the 11th section of that statute were incidental to reputed ownership;" reputed ownership, therefore, is con-

1819. 3  
  
 OLIVER  
 v.  
 BARTLETT,

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(a) *Doug.* 317.—(b) 9 *East.* 241.—(c) 1 *Maule & Selw.* 398.—(d) 1 *Bos. & Pul.* 82.

1819.  
  
 OLIVER  
 v.  
 BARTLETT.

nected with the order and possession of the property. The question, therefore, put at the trial, when connected with the facts of this case, was, I think, admissible as evidence of the order and disposition of the bark in question by the bankrupt. Although it has been said, that the case of *Gurr v. Rutton* was distinguishable from the present, still, I think it decisive of the point in question; that was an action of trover by the assignee of a bankrupt, to recover the possession of property alleged to have belonged to him before his bankruptcy as reputed owner; there, evidence was received, that the reputation amongst the servants and neighbours of the bankrupt was, that he was the owner; and for the defendant, contradictory evidence of that reputation was admitted to shew, that he paid the taxes of the farm, and that he was considered by a number of tradesmen as the sole owner and proprietor of the stock. Whether the reputation in that case was a matter of fact or not, still, Lord Chief Justice *Gibbs* admitted evidence of it, both for the plaintiff and defendant; and his Lordship there said, "What is the reputation of ownership? it is made up of the opinions of a man's neighbours; it is a number of voices, as it were, concurring upon one or other of two facts." So here, the question put at the trial was admissible to shew the reputation of ownership which the bankrupt had among his neighbours. If no other evidence had been adduced, I do not say, whether this question would have been admissible or not, neither is it necessary to determine, whether reputed ownership can be proved in any case without admission of facts to support it; but on looking to all the facts of the present case, I think the evidence of reputation was properly admitted, and that this rule ought therefore to be discharged.

Mr. Justice PARK.—I do not think it necessary to give an opinion on the abstract question, whether evidence of

1819.  
 OLIVER  
 v.  
 BARTLETT.

reputation was admissible in this case, unless it was supported by facts. But it appears quite clear from the report of the learned Judge who tried the cause, as well as from the testimony of one of the witnesses who was examined for the plaintiffs, that the bankrupt exercised various acts of ownership over the stock in question; that he had the sole apparent ownership, and therefore he was considered as owner. My Brother *Blisset* has said, that the word "reputed" can only apply to the *apparent* owner. But the statute of *James* does not consider him as the real owner. By the preamble it appears, that the object of the statute was, to afford relief to creditors against such as shall become bankrupts, and the word "reputed" is used to protect them from the effects of a false reputation. Mr. Justice *Lawrence*, in *Horn v. Baker* (a), said, "The question in these cases is rather a question of fact than of law." The fact here, was made up not merely on the vague opinions of others, but on the judgment of those who had seen the party do certain acts, by which not only they reputed him to be the owner of the rick in question, but their neighbours also, were of the same opinion. The case of *Gurr v. Rutton* (b), is expressly applicable to this point. My Brother *Lees* doubted, whether the continuation of credit was admissible in evidence, from the ostensible appearance of ownership held out by the bankrupt, but that is the very object for which the statute meant to provide. I, therefore, think this question, as to reputation, was properly put and received in evidence, and that there is no ground for a new trial.

Mr. Justice BURROUGH.—The question in this case certainly depends on the construction of the stat. 21 Jac. 1. c. 19. s. 11. and we must reject the word "reputed" alto-

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(a) 9 East. 241.—(b) 1 Holt's Rep. 327.



1819.  
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OLIVER  
v.  
BARTLETT.

gether from that clause, if the question put at the trial was not admissible in evidence. What are the circumstances? The bark originally belonged to the bankrupt, he exercised repeated acts of ownership over it, till within a short time previous to his bankruptcy, when it was seized; he sold it to his father-in-law, the defendant, but no steps were taken to give the latter the visible possession. It is said the defendant was the true owner; he might have been so, but still he left the property in the apparent possession of the bankrupt. Every disposition of it was made by him, and by those acts he was considered the real owner. The statute of *James*, therefore, is particularly applicable to this case. It has been said, that the witnesses for the plaintiff had not connected their evidence of reputation with fact; but that was unnecessary, for possession alone is sufficient to raise a presumption, that the ownership was in the bankrupt. One of them swore, that he gave the bankrupt credit on the ground of such belief. That testimony was clearly within the statute. Even if there had been no decision on this subject, I should have thought that the evidence offered at the trial was receivable, but Lord Chief Justice *Gibbs* not only held that it might be received in the case of *Gurr v. Rutton*, but his Lordship there also admitted evidence contradictory of the reputation. The reputation of ownership might have been done away with by shewing that the bankrupt was merely a trustee, or an executor, but the plaintiff proved not only the reputation of ownership, but the possession of, and disposition by the bankrupt, as owner, to the eve of his bankruptcy. I therefore think, that the evidence offered at the trial, was properly received, and that the verdict of the Jury was perfectly correct.

Rule discharged (a).

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(a) Mr. Justice *Richardson* was absent.

1819.

ATKINS and Others, Assignees of TREDBOLD, a  
Bankrupt, v. SEWARD.

Friday,  
June 18.

MR. Serjt. Pell moved, that it might be referred to the prothonotary taxing the costs for the plaintiffs, as assignees of a bankrupt in this cause, under the 49th Geo. 3. c. 121. s. 10. (a). At the trial of the cause, the petitioning creditor's debt and act of bankruptcy were disputed, and notice was given by the defendant of his intention so to do. The plaintiffs were nonsuited, although the trading petitioning creditor's debt and act of bankruptcy had been most clearly and satisfactorily proved, which the learned Judge certified accordingly. The prothonotary, on taxation, considered, that he was not empowered by the above clause to give the plaintiffs the costs, of proving the facts

If the plaintiffs, as assignees of a bankrupt, prove the petitioning creditor's debt, trading, and act of bankruptcy, at the trial, pursuant to notice by the defendant so to do, and are afterwards nonsuited, they are not entitled to costs, under 49 Geo. 3.

c. 121. s. 10. as that clause relates only to cases where they obtain a verdict.

(a) By which it is enacted, "That in any action brought by or against any assignee of a bankrupt, the commission of bankruptcy, and the proceedings of the commissioners under the same, shall be evidence to be received of the petitioning creditor's debt, and of the trading and bankruptcy of such bankrupt, unless the other party in such action shall, if defendant, at or before the time of his pleading to such action, and if plaintiff, before issue joined in such action, give notice in writing to such assignee, that he intends to dispute such matters, or any of them; and where such notice shall have been given, if such assignee shall at the trial prove the matter so disputed, or the other party shall at the trial admit the same, the Judge before whom the cause shall be tried, shall, if he shall see fit, grant a certificate that such proof or admission was made upon such trial, and such assignee shall be entitled to the costs, to be taxed by the proper officer, occasioned by such notice; and such costs shall, in case the assignee shall obtain a verdict, be added to his costs; and if the other party shall obtain a verdict, shall be set off or deducted from the costs which such other party would otherwise be entitled to receive from such assignee."

2419.

ATKINS  
v.  
SEWARD.

contained in the defendant's notice, as such clause extended only to cases where the parties had obtained a verdict.

The learned Serjeant contended, that although the costs were not expressly provided for by that section, in case of a nonsuit, still, that the plaintiffs were entitled to them in the equitable view of the statute.

Lord Chief Justice DALLAS.—The only question is, whether the plaintiffs, as assignees, are entitled to costs under the 10th section of 49th Geo. 3. c. 121. They could only be entitled in case they had obtained a verdict. The statute contains no provision in case of a nonsuit, and therefore, this application does not come within it. The clause is positive and clear, and as a nonsuit is not provided for, the Court has no authority to remedy the omission.

*Per Curiam.*

Rule refused.

Friday,  
June 18.

CHEVALIER and Another, Executors of Fox, deceased,  
v. FINNIS, Gent. one, &c.

If a plaintiff be resident abroad, the Court will require him to give security for costs, although he sue in the capacity of executor.

Mr. Serjt. *Lens*, on a former day in this term, had obtained a rule *nisi*, that the plaintiffs in this cause should give security for costs, on an affidavit which stated, that they were resident in *Jersey*.

Mr. Serjt. *Hullock* now shewed case, and admitted that they were resident in *Jersey*, but contended they were not liable to be called on to give security for costs, as they were merely executors, and suing *en autre droit*, and could not in that character be subject to the payment of costs,

even if they resided within the jurisdiction of the Court ; he observed, that the rule applicable to cases of this nature was in the discretion of the Court, and that security for costs was therefore not grantable of course, because the plaintiff should happen to be resident out of the country ; he also referred to the case of *M'Culloch v. Robinson* (a), where Mr. Justice *Chambre* said, " By the general rule of law, every man not legally incapacitated, may sue without giving security for costs ; but the Court has interposed in certain cases, and required security. This, however, is matter of discretion ; and being so, the rule which has been adopted, is not so positive and inflexible as not to yield to particular circumstances." He produced an affidavit which stated, that an action was brought by the plaintiffs in their character as executors, against the defendant, to compel the delivery and account of monies received by him for the use of the testator, and that the defendant had admitted that he had a balance then in his hands, and due to the plaintiffs, as executors, of £119. 14s. 9d. which was more than sufficient to answer all costs which the plaintiffs might become liable to pay in case of being *nonprossed* or nonsuited, or having a verdict found against them at the trial. Even in case they were not suing in the character of executors, it is quite clear, that if they were nonsuited or had a verdict against them, they were not liable to costs, as they could sue in no other character than that of executors : and as the defendant had admitted that he had £119 in his hands, which was the property of the testator, it would be more than enough to cover the costs which the plaintiffs might be put to in case he should succeed ; and that the absence of the plaintiffs, therefore, was immaterial, as they could not in law be deemed liable, even if they were resident in this country.

1819.  
 CHEVALIER  
 v.  
 FINNIE.

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(a) 2 *New Rep.* 352.

1819.  
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 CHEVALIER
 v.
 FINNIS.

Mr. Serjt. *Lens*, in support of the rule, observed, that there was no case in which a distinction had been drawn between plaintiffs suing in their own, or representative characters as executors, so as to free them from the liability of giving security for costs; it is, therefore, quite immaterial in this case that the plaintiffs have sued in their character of executors; and as the defendant has admitted that he is liable to them for £119, he may pay that sum into Court, and they will then have their remedy *ultra*.

Lord Chief Justice DALLAS.—The general rule in cases of this description is, that if a plaintiff be resident out of the jurisdiction of the Court, he may be required to give security for costs; and it has been admitted by my Brother *Hullock*, that the plaintiffs here were resident at *Jersey*, and consequently out of the jurisdiction; the only question then is, whether this case may in other respects, be distinguished from the general rule, as the plaintiffs sue in the capacity of executors. It has been said that this rule is only applicable to parties suing in their own rights, and must be considered as nugatory in the cases of executors, as in case of a verdict the defendant could only recover *de bonis testatoris*, and that the plaintiffs would not be liable *de bonis propriis*; but this is not always the fact, for executors may be liable to pay costs according to the particular circumstances of the case; and as the Court cannot go into merits in an application of this nature on affidavits, although the plaintiffs have sued as executors they may still be liable to costs. I, therefore, am of opinion, that this case falls within, and must be governed by the general rule.

Mr. Justice PARK and Mr. Justice BURROUGH, concurred.

Rule Absolute.

1819.

Saturday,
June 19.

PAIN v. ACTON.

Mr. Serjt. Cross moved for a rule *nisi*, that the defendant might be allowed his costs in this cause, under the 43 Geo. 3. c. 46. s. 3. (a), on the ground that he had been held to bail without probable cause. It appeared that he was arrested for £100 and upwards. The plaintiff, in the particulars of his demand, claimed £130, due to him from the defendant for the lighterage and freight of oats and hay. On the cause coming on for trial before Lord Chief Justice Dallas, at *Guildhall*, at the Sittings after the last Term, it was referred to an arbitrator, by the consent of the parties, under a rule of Court. It was afterwards proved before the arbitrator, that a contract had been entered into between the plaintiff and defendant, for lighterage, at the rate of 4*d.* per quarter for oats, and 4*s.* 6*d.* per ton for hay; and that the plaintiff had charged the lighterage of oats at 6*d.* per quarter, and had nearly doubled the sum which he had agreed to charge for hay, which surplus being taken off, had reduced his demand to £85 less than he had charged. The arbitrator awarded the plaintiff £20 only.

If a defendant be arrested for £100, and the cause be afterwards referred to an arbitrator, who finds that £20 only are due to the plaintiff.—Held: that the defendant is not entitled to his costs, under 43 Geo. 3. c. 46. s. 3. on the ground of an arrest without probable cause.

Lord Chief Justice DALLAS.—The parties agreed at the trial to refer this cause to an arbitrator. It was stated, at the reference, that the plaintiff was not entitled to the amount of the sum he demanded, and the arbitrator found that there was a contract between him and the defendant, by which the former had agreed to receive a cer-

(a) See this section, *ante*, vol. i. p. 93.

1819.
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 PAIN  
 v.  
 ACTON.

tain sum for the lighterage of the articles in question, and that he consequently was not entitled to receive the sum he demanded from the defendant, and with which he had charged him. There appears to have been no vexation on the part of the plaintiff, and I therefore think there is no ground for the application.

Mr. Justice RICHARDSON.—The defendant litigated the question before the arbitrator, and depended on the agreement entered into between him and the plaintiff.

*Per Curiam.*

Rule refused.

Tuesday,  
 June 22.

HAMLEY v. ALLASTON.

In order to obtain leave to enter up judgment on an old warrant of attorney, the affidavit must state that the defendant was alive on a day within the term in which the application is made.

Mr. Serjt. *Lens* moved to enter up judgment on an old warrant of attorney on two affidavits, the one of which stated that the deponent believed the defendant to be alive, the other that he believed him to be so, as he saw and conversed with him nineteen days since, which was before the commencement of the present term.

The Court, on inquiring of the Secondary, found, that by the rule of practice here, the party must swear that the defendant was alive within fourteen days before the making of the application. But they ordered, that in future the affidavit must state that the defendant was alive on a day within the term in which the application is made, in order to render the practice conformable to that of the Court of *King's Bench*.

1819.

Tuesday,  
June 22.

## ARCHER v. CHAMPNEYS.

MR. Serjt. *Lens*, on a former day, had obtained a rule nisi, that the bail bond executed in this cause might be delivered up to be cancelled, and the defendant be at liberty to enter a common appearance, and that in the mean time all further proceedings might be stayed, on the ground of his having been arrested a second time for the same cause of action. It appeared that the defendant was some time since arrested at the plaintiff's suit, in the Court of *King's Bench*, for the recovery of the same debt for which he was now held to bail; but that that action had been either discontinued or nonprossed, and the costs paid by the plaintiff before the commencement of the present suit.

A defendant cannot be held to bail a second time for the same cause of action, if the plaintiff nonpros or discontinues the former, unless such plaintiff shew that he did so on account of a mistake or misconception, and that the second arrest was not vexatious.

Mr. Serjt. *Vaughan* now shewed cause, and submitted, that when the plaintiff had discontinued his action, or been nonsuited or nonprossed, he might hold the defendant to bail a second time. In support of this proposition, he referred to *Barnes (a)*, and *Harris v. Roberts (b)*, where it was held, that if a plaintiff were nonprossed, he might re-arrest the defendant, as he suffers enough by paying costs in the first action, and therefore ought not to be in a worse condition than before. No distinction can be drawn between a nonsuit or a nonpros, for the one takes place on defect of evidence, and the other originates in mistake; and in *Bates v. Barry (c)*, it was held, that a defendant might be arrested a second time for the same

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(a) 73. — (b) 1 *Str.* 439. — (c) 2 *Wils.* 381.



1819.  
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 ARCHER
 v.
 CHAMPNEYS.

cause of action, after discontinuance, by reason of a mistake. That in *Harris v. Roberts*, the defendant was held to bail a second time, the plaintiff having been nonprossed in the original action, besides, there is nothing to shew that the present arrest is vexatious. But,

Per Curiam, The general rule is, that a defendant cannot be re-arrested after a discontinuance, nonsuit, or nonpros, unless the former action was founded on a mistake, which mistake would tend to shew, that the second arrest was not vexatious. But it is not only necessary for the plaintiff to shew that he discontinued or nonprossed the former action, on the ground of misconception or mistake, but that the second arrest was not vexatious; and if he does not do this, the Court will infer that it was so.

Rule absolute, with costs (a).

(a) See *Tidd*, 6th edit. 177. *Impey's C. P.* 65.

Tuesday,
 June 22.

MARTIN v. BURTON.

To a declaration of replevin, for taking the plaintiff's goods, the defendant made cognizance as the bailiff of *Temperance Arden*, executrix of *Joseph Arden*, deceased, and well acknowledged the taking, &c. because he said cognizance, as bailiff of an executrix, under 32 Hen. 8. c. 37., for arrears of rent incurred in the life-time of the testator. Held: that such avowry need not set out the title of the testator, or shew the executrix was entitled to distrain under that statute, and that at all events it could not be objected to after verdict.

that the plaintiff, from the 29th of *September*, 1817, until and upon the 25th of *March*, 1818, and from thence until the death of the said *Joseph Arden*, which happened on the 10th of *April*, 1818, held and enjoyed the dwelling-house in which, &c. with the appurtenances, as tenant thereof to the said *Joseph Arden*, under and by virtue of a certain demise thereof, theretofore made, at and under the yearly rent of £30, payable quarterly, to wit, on the 25th of *March*, the 24th of *June*, the 29th of *September*, and the 25th of *December*, in each and every year, &c. and because the sum of £15 of the rent aforesaid for the space of half a year of the said time ending on the 25th of *March*, 1818, became due and in arrear to the said *Joseph Arden*, deceased, in his life-time, and continued so in arrear and unpaid until and at the time of the death of the said *Joseph Arden*, and from thence until and at the time when, &c. continued in arrear from the plaintiff to the said *Temperance Arden*, as such executrix as aforesaid, and the said dwelling-house, at the said time when, &c. continued in the possession of the plaintiff. And the defendant, as bailiff of the said *Temperance Arden*, as such executrix as aforesaid, well acknowledged the taking of the said goods and chattels in the declaration mentioned, in the said dwelling-house in which, &c. and justly, &c. as, for, and in the name of a distress for the said rent so due and in arrear as aforesaid, and which said rent still remained due, and in arrear, and unpaid; and this, &c. wherefore, &c. And the defendant brought into Court the letters testamentary of the said *Joseph Arden*, deceased, whereby it appeared that the said *Temperance Arden* was executrix of the last will and testament of the said *Joseph Arden*, deceased, and had the execution thereof.

The plaintiff pleaded in bar, *first*, that he did not hold or enjoy the dwelling-house as tenant thereof to the said

1818.
MARTIN
v.
BURTON.

1819.
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 MARTIN  
 v.  
 BURTON.

*Joseph Arden*; secondly, that there was no rent in arrear; and lastly, that *Joseph Arden* entered and evicted him. On these pleas issue was joined; and at the trial of the cause, before Lord Chief Justice *Dallas*, at Westminster, at the Sittings after the last Term, a verdict was found for the defendant on all those issues.

Mr. Serjt. *Hullock*, on a former day in this term, had obtained a rule nisi, that judgment might be entered for the plaintiff *non obstante veredicto*, on the ground that an executor can only distrain for rent by virtue of 32 Hen. 8. c. 37. s. 1. (a), and that where a person acts under a statutable authority, he must not only derive his authority under the act, but must bring himself within the terms of it in his plea. By the statute, the party distraining must be the personal representative of a person seized in fee, in tail, or for life, of the rents therein specified; and on this cognizance, no interest whatever of the testator is stated. In *Turner v. Lee* (b), it was decided, that on the death of a grantee of a rent-charge, his personal representatives could not distrain for arrearages under the statute of Hen. 8. So, tenants of terms for years are not within that statute; and it does not appear here that the testator had such an interest as would entitle his executor to distrain.

Mr. Serjt. *Vaughan* now shewed cause.—It is wholly unnecessary to shew what title the testator had on this record. It was not put in issue at the trial, and no question was raised, whether he was seized of a less interest than a freehold. The case of *Turner v. Lee* was properly decided; but it did not appear there to be necessary to set

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(a) See this section, *ante*, vol. ii. p. 52.—(b) *Cro. Car.* 471.

out the title of the testator in all cases on the record. The late case of *Meriton v. Gilbee* (a) is decisive as to this question, where this Court held, that it was unnecessary, in an avowry by an executrix in replevin, under the statute of 32 Hen. 8. to shew the title of her testator.

1819.  
  
 MARTIN  
 v.  
 BURTON.

Mr. Serjt. *Hullock*, in reply, observed, that this avowry could not be sustained at common law, and adhered to the principle, that where a party acts under a statutable authority, he must not only bring himself within it, but set it out in justifying under it. In avowries under the statute 8 Anne, c. 14. ss. 6. & 7., the landlord may distrain for rent after the determination of the lease, but such distress must be made within six months after the end of such lease, and during the landlord's title and tenant's possession; the party, therefore, in order to come within that statute, always alleges that the distress was made before the six months had expired.

Lord Chief Justice DALLAS.—This case must be governed by the late decision in *Meriton v. Gilbee*, from which the Court see no reason to depart.

Mr. Justice RICHARDSON.—This is an application in arrest of judgment, and cannot be now entertained. The question as to title should have been raised by a plea in bar.

*Per Curiam.*

Rule discharged.

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(a) *Ante*, vol. II. p. 48.

1819.

Tuesday,  
June 23.

## HULL v. PICKERSGILL and Others.

An uncertificated bankrupt cannot maintain an action of trespass against subsequent creditors, for breaking open his house, and seizing his after-acquired property, although his assignees do not ratify the seizure, and although they were unknown to the defendants until after the commencement of the action.

THIS was an action of trespass for breaking and entering the plaintiff's dwelling-house, making a disturbance therein, forcing and breaking open the doors, and breaking to pieces the locks thereof, and also for breaking open divers chests and boxes, and taking away goods contained therein. The defendants pleaded, first, Not Guilty; secondly, that the several supposed trespasses were done by authority of a certain act of parliament made in the 13th year of the reign of Queen *Elizabeth*, intituled, "An act touching orders for bankrupts;" and lastly, that the supposed trespasses were done by authority of a certain act of parliament made in the 1st year of King *James 1*, intituled, "An act for the better relief of the creditors against such as shall become bankrupts." The plaintiff added a *similiter* to the first plea, and replied to the second and last *de injuria*, on which issue was joined.

At the trial of the cause before Lord Chief Justice *Dallas*, at *Westminster*, at the sittings after the last term, it appeared in evidence, that in 1816, the plaintiff, who then resided and carried on business in *Warwickshire*, became a bankrupt; that a commission was there issued and prosecuted against him, but that no dividend had been paid under it, nor had the plaintiff obtained his certificate before the commencement of the present action; that a short time after his bankruptcy, he came to settle in *London*, where he contracted a debt with the defendant *Pickersgill*, to the amount of £600; that in *February*, 1818, he called a meeting of his creditors, to whom he had become indebted since his bankruptcy, among whom was *Pickersgill*, and proposed to pay them 5s. in the pound, or to give up his stock in trade, to be

divided amongst them, if they would release him from all demands, and forbear to enquire as to his distressed situation; to this several of the creditors acquiesced; but the defendant *Pickersgill* refused to do so, when the plaintiff told him he was an uncertificated bankrupt; and that if he would not accede to this arrangement, he would have nothing, as the effects belonged to the assignees under the commission. On the following day, the plaintiff was arrested at the suit of *Pickersgill* for £630, being the sum in which he was then indebted, who, with the assistance of the other defendants, as brokers, entered his house, and seized the goods in question, for which they left a notice, stating that the property was taken on the account, and for the general benefit of his unsatisfied creditors. Under these circumstances, those creditors, who had proved their debts under the commission, authorised the assignees, in the month of *May* following, to assign to the creditors since the bankruptcy, all the interest which they had in the property seized, and also gave the defendant *Pickersgill*, as one of such creditors, an authority to defend this action. The order for the assignment was given on the 14th of *April*, and an application was made to the attornies of the assignees before the commencement of the present action, but the assignment itself was not executed by the assignees to *Pickersgill*, till the 4th of *May* following, after a rule to plead had been given. His Lordship having summed up these facts to the Jury, they found a verdict for the defendants; but leave was given the plaintiff to move that it might be entered for him.

1819.  
 HULL  
 v.  
 PICKERSGILL  
 and Others.

Mr. Serjt. *Vaughan*, on a former day in this term, had accordingly obtained a rule *nisi*, that this verdict might be set aside, and instead thereof, a verdict might be entered for the plaintiff, on the grounds, that the defendants did not know that the plaintiff was an uncertificated bankrupt,


1819.  
HULL  
v.  
PICKERSGILL  
and Others.

and that an uncertificated bankrupt, who acquired property after his bankruptcy, might maintain trespass for it against all the world but his assignees; that the subsequent assignment by the assignees, being after the commencement of the action, their assent to the present action could not avail, so as to enable the defendants to justify by relation, and that until that assignment was made, they had no authority to defend this action; that at all events they could not justify breaking open the plaintiff's locks, as by the statute 21 Jac. 1. c. 19. s. 8. (a), the commissioners of a bankrupt were only entitled so to do, and that they could not empower others without granting a warrant to them for that purpose. Although the assignees themselves might have a right to the future-acquired property of the plaintiff, still the defendants had no right to break open his house, which he had taken possession of since his bankruptcy, and more particularly so, since they had no authority, by warrant, to enter at the time of the committing the trespass, as the plaintiff had told them, that the property therein belonged to his assignees, of whom the defendants had then no knowledge; the defendants' pleas therefore were no justification, because they did not enter by virtue of the commission, and therefore the defendants might be considered as perfect strangers. He

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(a) By which it is enacted, "That in the execution of a commission, it should be lawful for the commissioners, or the greater part of them, or any other person or persons, officer or officers, by them to be deputed, by their warrant under their hands and seals, to break open the house or houses, chambers, shops, warehouses, doors, trunks, or chests of the bankrupt, where the bankrupt, or any of his goods or estate, should be, or be reputed to be, and to seize and order the body, goods, chattels, ready money, and other estate of such bankrupt, as by the former laws were limited and appointed, whether it were by imprisonment of his body or otherwise; as to the commissioners, or the greater part of them, should be thought meet."

cited the cases of *Webb v. Fox* (a), and *Fowler v. Down* (b). He also insisted, that the ratification by the assignees must be limited to actions of contract, and could not extend to trespass; for which he relied on the case of *Lucena v. Craufurd* (c).

1819.  
  
 HULL  
 v.  
 PICKERSGILL  
 and Others.

Mr. Serjt. *Lens* now shewed cause.—The only question turns on the legal effect of what has been done under the commission of bankrupt formerly issued against the plaintiff, so as to prevent the defendants from seizing his goods, or, whether the plaintiff had a sufficient possession to maintain the present action. If the assignees had consented previous to its commencement, there could have been no doubt, but here there was no evidence either of a ratification or assent of possession by them; the bankrupt himself had no property even as against strangers, unless his assignees had recognized his possession, but they had no knowledge of it until after the commencement of the action; on the defendants' application to them, they did not state that the plaintiff had any right of his own, but merely transferred their rights by assignment; *prima facie* the title was not in the plaintiff, but in them, and therefore he could not maintain this action; for a long period after the bankruptcy, the assignees had allowed the bankrupt to carry on trade on his own account; the defendants need not shew a ratification by the assignees, as it was not proved that the plaintiff had any right on which to maintain the action. Wherever a bankrupt has been protected for property acquired after his bankruptcy, there has been an assent on the part of the assignees; *Webb v. Fox* and *Fowler v. Down*; but here the act of the defendants has been ratified

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(a) 7 Term Rep. 391. — (b) 1 Bos. & Pul. 44. —  
 (c) 3 Bos. & Pul. 75. S. C. 2 New Rep. 269. 1 Taunt.  
 325.



1819.  
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 HULL
 v.
 PICKERSGILL
 and Others.

by the assignees, who most clearly were empowered to enter the plaintiff's house, and seize the property in question. The defendants therefore were placed precisely in their situation; for the plaintiff, being an uncertificated bankrupt, had no right to that property which completely belonged to the assignees. Their assignment to the defendants was a perfect recognition of their title; and if the one may justify, so may the other. The statute 21 Jac. 1. c. 19. s. 8. is not applicable to this action, as that clause was enacted to remove doubts which had previously existed as to the powers of commissioners and assignees. The ratification by assignees was equally applicable to cases of tort as to those of contract, previous to the case of *Lucena v. Craufurd* (a).

Mr. Serjt. *Vaughan*, in support of his rule, observed, that the statutes under which the defendants justify, only entitle assignees to enter under a commission, and cannot apply to the defendants, who are merely creditors after the bankruptcy; though the plaintiff is an uncertificated bankrupt, still all his property did not vest in his assignees as against all the world. By the statutes of bankruptcy, an uncertificated bankrupt, when contending with strangers, need not shew the consent of his assignees to his possession of the property. Mr. Justice *Heath*, in *Fowler v. Down* (b), said, that "a bankrupt has a defeasible property which none but the assignees can defeat, and that he is like an alien who may purchase lands, and maintain an action for them, unless the crown interpose." It is true he has no property against them without their assent, but he has a sufficient title to maintain either trover or trespass

(a) 3 Bos. & Pul. 75. S. C. 2 New Rep. 269. 1 Taunt. 325.—(b) 1 Bos. & Pul. 48.

against all but them. The future-acquired property of a bankrupt does not necessarily vest in the assignees, unless his former fund be insufficient to satisfy his debts; it is not therefore sufficient for them to shew alone that he was an uncertificated bankrupt, but also that his former property, at the time of his bankruptcy, was insufficient to satisfy the demands of his creditors, and that his former debts still remain unpaid. There is a wide distinction between the real and personal property of a bankrupt; for if the plaintiff had purchased the house in question, a new assignment would have been necessary; if he had entered for the benefit of the assignees, and without their authority, their subsequent ratification might have been good; but it must be shewn that such ratification was made for their benefit at the time. In *Lucena v. Craufurd*, when the insurance was effected, it was uncertain in whom the property was, but as it was effected for the Crown, it afterwards availed for its benefit. Here, if the plaintiff had been killed, could the defendants have justified that act, which would have been clearly unlawful at the time the trespass was committed, for the plaintiff had an absolute, indefeasible, and unimpeachable property against all persons except his assignees. Even if the defendants had asserted, that they entered on the part of the assignees, still their subsequent ratification would not have availed, as they had then no communication whatever with each other, but most clearly the seizure was not made for the benefit of the assignees. If the plaintiff had turned the defendants out of the house, he would have been clearly justified in doing so, and might have pleaded that they had no authority given them by the assignees, at that time to enter, and therefore *molliter manus imposuit*. The defendants' justification here goes to the time of plea pleaded, but the ratification by the assignees was not given till after the rule to plead had been served; at the time

1819.

HULL

v.

PICKERSGILL
and Others.

1818.
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 HULL  
 v.  
 PICKERSGILL  
 and Others,

the trespass was committed, the defendants could not be justified, as then they had received no authority from the assignees; the entry was not made on their account, and yet the defence relied on is the ratification by them after the time for pleading had expired. If there had not been sufficient effects under the commission to satisfy the debts of the former creditors, the after-acquired goods would have become the property of the assignees, but that fact was not proved at the trial, so that the goods in question might have been the property of a third person, when even the assignees themselves would have had no right to enter. In *Silk v. Osborne* (a), where it was determined that an uncertificated bankrupt might maintain an action for work and labour, and materials found, Lord *Kenyon* held, that "however the question might be between the bankrupt and his assignees, as they might certainly take whatever personal property belonged to him without any fresh assignment, yet that it did not lie in the mouths of third persons to set up such a defence." Here, therefore, the defendants may be considered as third persons, and are liable for breaking and entering the plaintiff's house, which might have been his own in fee, and acquired after his bankruptcy, when a new assignment would have been necessary. The pleas of justification therefore amount to no more than the general issue, as at the time the trespasses were committed, the defendants had no authority whatever delegated to them by the assignees.

Lord Chief Justice DALLAS.—No distinction was taken at the trial between the house in which the bankrupt resided, and the property taken in it, as has been now suggested; neither was it shewn that he had any freehold

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(a) 1 *Esp. Ni. Pri. Rep.* 140.

1819.

HULL  
v.PICKERSGILL  
and Others.

in the house, but on the contrary, it was proved, that he was merely a tenant or occupier, and the question in dispute was narrowed to this sole point, on which alone the present rule was obtained, whether the subsequent adoption, by the assignees, of the entry and seizure made by the defendants, justified the latter; or, in other words, whether, as they had no authority at the time the trespass was committed, the subsequent ratification by the assignees was equivalent to a command from them. First, then, as to the facts of this case:—It was admitted, that the property in question did not belong to the plaintiff, but to his assignees, and this appeared by his own information and statement to the defendant *Pickersgill*, and other subsequent creditors. Because, therefore, that defendant seized these goods after such a declaration, the plaintiff commenced the present action. Subsequently to this seizure, the assignees were applied to, that they might ratify the steps which had been taken, although they were unknown at the time the entry and seizure took place, but it was then fully known that there had been a previous act of bankruptcy committed by the plaintiff, that he had obtained no certificate, and that the property in his possession belonged to his assignees; that, I take it, was sufficient, and more especially so, as, on a subsequent application being made to them, they consented to ratify and confirm the acts done by the defendants, and invested them with their rights as assignees; the rule of Law is, that he who agrees to a trespass after it is committed, is no trespasser, unless it be done for his benefit, and then his subsequent adoption amounts to a command, according to the maxim, *omnis ratihabitio retrotrahitur et mandato priori quiparatur*. It is quite clear, that in this case, the assignees might seize the property in question. Although they had not commanded the seizure at the time, still they afterwards acquiesced and assented to it, which was equivalent to a command in the first instance; but it


1819.  
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 HULL
 v.
 PICKERSGILL
 and Others.

has been contended, that this was not done for their benefit at the time; to that I cannot accede, for the bankrupt himself said the property did not belong to him, but to his assignees. The goods were therefore, in fact, seized for their benefit; for if it were necessary that they should have had an interest at the time of the seizure, such interest was fully established by the evidence, for the seizure had reference to the immediate information derived from the plaintiff himself; I therefore think that both the entry and seizure made by the defendants may be considered as having been made for the benefit of the assignees.

Mr. Justice PARK.—I am of the same opinion, on the ground, that the evidence adduced at the trial brings this case within the rule and maxim stated by his Lordship. The doctrine relative to that maxim was well argued in the case of *Hagedorn v. Oliverson* (a), where it was contended, that it was not applicable to contracts, but must be confined to cases of *tort* alone. The same distinction which has been taken by my Brother *Vaughan* here was also adopted by my Brother *Taddy* in that case, and he cited a case from the Year Books (b), upon an inquest between two parties, on a writ of trespass for taking cattle, in which the question was, whether the defendant was entitled to make the seizure in claim of a heriot? it was said, that if, when he took them, he claimed property for a heriot to himself, he would be liable, although the lord afterwards agreed to the taking for services due to him, but that if he had taken them for the lord, although the lord had not known it, and he had afterwards adopted or agreed to this taking, he might justify, though he had never been his bailiff before. The Law, therefore, there allowed the lord to adopt the act of his bailiff. So here

(a) 2 Maule & Sel. 485, — (b) 7 Hen. 4. p. 35.

the evidence amounts to an adoption by the assignees. The defendant *Pickersgill* went to the plaintiff, an uncertificated bankrupt, who said, that the property in his possession was not his own, but his assignees', and that unless they would take 5s. in the pound, they could have nothing. When this declaration was made to him, he, with the other defendants, seized the goods, as being the property of the assignees, who afterwards adopted the entry and seizure. It therefore seems to me quite clear that the defendants seized the property, taking it for granted, that the assignees would afterwards adopt their acts, and give them the sanction of a prior command.

1819.

 HULL
 v.
 PICKERSGILL
 and Others.

Mr. Justice BURROUGH.—The question is, whether the evidence adduced at the trial was sufficient to maintain the defendants' pleas of justification. The acts of the plaintiff, as referable to the trespass, were sufficient to warrant the Jury in coming to the conclusion they did; for he stated to one of the defendants, that he was an uncertificated bankrupt, and that all the property of which he was then possessed belonged to his assignees. On this avowal the parties acted, and in fact made the entry and seizure for the assignees. The case alluded to by my Brother *Park*, from the Year Books, is particularly applicable to the present. Here, there was no express command by the assignees, but the defendants acted for them under the commission, and they afterwards ratified the acts of the defendants. This case therefore falls within the maxim of *omnis ratihabitio retrotrahitur*, &c. (a), and I therefore think the plaintiffs are entitled to retain their verdict.

Mr. Justice RICHARDSON.—The only question is, whether, from the evidence adduced at the trial, the

(a) *Wingate's Maxims*, 485.

1819.

 HULL
 v.
 PICKERSGILL
 and Others.

defendants entered and took the plaintiff's goods for the benefit of the assignees; and under all the facts of the case, I think they did. I agree that every case ought to be confined to the grounds and principles of law. The declaration by the plaintiff is alone a sufficient reason to warrant the verdict found for the defendants, according to the justice of this particular case. They thought that they should find more integrity in the assignees than the plaintiff, and therefore took the goods for their benefit, trusting that they would ratify the seizure. In this they were not disappointed; and the defendants may therefore be considered to have acted for the benefit, and under the authority of the assignees; for although the trespass was originally committed without their authority, and although the defendants were not then authorised by them so to do, and the assignees were not informed of what had taken place, still the subsequent ratification by them has reference to the commission of the original trespass. As to entering the house, no distinction was drawn at the trial between that and the goods; and it was not even suggested that the plaintiff had a freehold interest in it; if he had only a chattel interest, the assignees were equally entitled to the house, as to the goods. As to the power of the defendants to break open the plaintiff's locks by virtue of the statute 21 Jac. 1., it was not necessary for them to shew under what authority they acted; for the 8th section of that statute merely provides that it shall not be necessary for assignees, other persons, or officers, in making a seizure, to take any farther warrant from the commissioners than their first assignment; I am therefore of opinion, that the verdict found for the defendants was perfectly right, and that this rule must be

Discharged.

1819.

PHILLPOTTS and Wife v. REED:

Wednesday,
June 23.

THIS was an action of assumpsit for money had and received by the defendant, to the use of the wife before marriage. The declaration contained the common money counts, a count for interest, and on an account stated. The defendant pleaded, first, Non-assumpsit; lastly, that after the making and passing of a certain act of parliament, made and passed in the 49th year of the reign of our lord the now king, intituled, "An act for establishing Courts of judicature in the island of *Newfoundland* and the islands adjacent, and for re-annexing part of the coast of *Labrador*, and the islands lying on the said coast, to the government of *Newfoundland*," and before the commencement of this suit, to wit, on the 10th of *January*, 1818, the defendant and one *Patrick Hine* were carrying on business under the firm and title of "*Hine, Reed, and Co.*" as merchants and co-partners at *St. John's*, in the island of *Newfoundland*; and being such partners, afterwards, on the day and year aforesaid, at *Newfoundland* aforesaid, became and were in due manner of law, in pursuance of and under the aforesaid act of parliament, declared to be insolvent, within the true intent and meaning of the said act. And the defendant further said, that afterwards, to wit, on the 20th of *May*, 1818, aforesaid, the major part of the creditors to the estate and effects of the defendant and *Patrick Hine*, carrying on business at *Newfoundland* as aforesaid, did there duly certify, that such declaration of insolvency was repeatedly inserted in the *St. John's Royal Gazette* and *Mercantile Journal*, and that the property and effects belonging to the said estate had been taken possession of for the benefit of the cre-

If a person become insolvent, and obtain his certificate at *Newfoundland*, under 49 Geo. 3. c. 27. s. 8, such certificate may be pleaded in bar to an action brought in this country, for a debt contracted here previous to the insolvency.

1819.
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PHILLPOTTS
and Wife
v.
REED.

ditors thereto, and that the defendant had in all things conformed himself agreeable to the said act concerning insolvents; and did farther certify, that the creditors, whose names and seals were signed and set to that certificate, were full one-half in number and value of the creditors of the defendant who had duly proved their debts under the said insolvency, and testified their consent to the defendant having such allowance and benefit as by the said last-mentioned act is allowed to insolvents, and to the defendant being discharged from his debts in pursuance thereof; which declaration of insolvency and conformity of the defendant was afterwards, to wit, on the 22d day of *November*, in the year aforesaid, duly certified and confirmed by the Surrogate Court of *St. John's*, in the island of *Newfoundland*, being a Court of competent jurisdiction in that behalf, according to the form and effect of the said act of parliament, as by the certificate of *Thomas Coote*, then Surrogate, given under his hand, and under the seal of the Supreme Court of *Newfoundland* (reference being had thereto), more fully and at large appears, which said certificate the defendant now brings here into Court, the date whereof is the day and year aforesaid; and the defendant farther said, that the said several supposed promises and undertakings in the said declaration mentioned, (if any such were made), were and each and every of them was made in respect of the debts contracted in *Great Britain* prior to the time when the defendant was so declared insolvent as aforesaid; and this he the defendant was ready to verify, wherefore, &c. if, &c. The plaintiffs added a *similiter* to the first plea, and demurred generally to the last; the defendant joined in demurrer. The case came on for argument this day, when

Mr. Serjt. *Lens*, for the plaintiffs, premised, that the question intended to be raised by the demurrer was, whe-

ther a certificate of discharge as an insolvent, obtained from the *Newfoundland* Courts, under the 49 Geo. 3. c. 27, is a bar to an action in the Courts in *England* for a debt contracted here previous to the insolvency? He observed, that the point depended entirely on the effect of the statute, the first section of which authorised the institution of Courts at *Newfoundland*, and extended their jurisdiction to *Great Britain*; but that the principal question depended on the sixth section (a); that the seventh

1819.
 PHILLPOTTS
 and Wife
 v.
 REED.

(a) By which it is enacted, "That as it would greatly contribute to the advancement of the trade and fishery of *Newfoundland* if such effects as persons becoming insolvent in the said island of *Newfoundland*, and the islands adjacent, were possessed of, or entitled unto within the said island, or in the islands or seas aforesaid, or on the banks of *Newfoundland*, should be divided among their creditors with more equality than had hitherto been practised; that as often as the goods, debts, and credits of any person shall be attached, and it shall be made appear to the Court, out of which the process of attachment had issued, that the goods, debts, and credits, so attached, were not sufficient to pay twenty shillings in the pound to all those who should be creditors by reason of debts contracted within the island of *Newfoundland*, and on the islands and seas aforesaid, or on the banks of *Newfoundland*, or in *Great Britain* and *Ireland*, it should be lawful for such Court to summon the party whose goods, debts, and credits were so attached, together with the plaintiff or plaintiffs who had sued out any attachment, and also such persons who were known to be creditors as aforesaid of the defendant, to appear in court at a certain day; and if upon a due examination of the defendant and the said creditors, it should appear that he or she is insolvent, the Court should declare him or her insolvent accordingly, and should immediately proceed to take order for discovering, collecting, and selling the effects and debts of such person, and distributing the produce thereof rateably amongst all the creditors of such person so declared insolvent; and for that purpose should authorize any one or more creditors of the defendant, who should be chosen by the major part in value of such creditors, whose debts amounted respectively to the sum of ten pounds and up-

1819.

PHILLPOTTS
 and Wife
 v.
REED.

merely directed the mode of distribution of the insolvent's estates, and that the eighth enacted, that a certificate obtained under a declaration of insolvency in *Newfoundland* should, when pleaded, be a bar to all suits for debts contracted in *Newfoundland* and in *Great Britain* or *Ireland*, previous to the insolvency. He contended, that the effect of the general words contained in all those clauses must be restrained by the subject-matter so as to narrow the application of the statute to the insolvent's property at *Newfoundland*, and his creditors there. That it would be a great hardship if creditors in this country should be barred by a certificate obtained in *Newfoundland*, though they might not have known of the parties insolvency, or have had an opportunity of proving their debts. The case of *Ballantyne v. Golding* (a), was distinguishable from the present, because there both the parties resided in *Ireland*, where the debt arose, and the bankruptcy took place. So in *Pedder v. Macmasters* (b), the debt was contracted by the defendant while he was resident at *Hamburg*, where he became bankrupt, and obtained his certificate, but that case is inapplicable, as the island of *Newfoundland* may be considered as forming part of the dominions of this country. In *Smith v. Buchanan* (c), it was held, that if a debt be contracted here, a certificate in a foreign country will not discharge it. In *Odwin v. Forbes* (d), an action was brought in *Demerara* for the recovery of goods consigned to the defendant in *London*, and he pleaded his

wards, to perform the same; and that such Court should, from time to time, make such order thereon as should be deemed proper for better discovering, collecting, and selling the effects and debts, and making a rateable distribution thereof among the creditors."

(a) *Cooke's Bankrupt Laws*, 499. S. C. 4 Term Rep. 185, n.—(b) 8 Term Rep. 609.—(c) 1 East, 6.—(d) *Buck's Cases in Bankruptcy*, 57.

bankruptcy and certificate in *England*, and it was held, that the bankruptcy and certificate were as a discharge to the debt. But that case was also dissimilar to the present, as there the plaintiff had notice of the bankruptcy, and the Privy Council had afterwards expressed their opinion against the plea which was in terms similar to the present. But all these cases are in fact inapplicable, as the statute of the 49 Geo. 3, has merely a partial operation, and applies only to the creditors of a party becoming insolvent at *Newfoundland*, who alone are entitled to receive the whole of his property. Such property could only be attached in that island, and it does not appear by the statute that the *English* creditors could share in the distribution of the insolvent's effects.

1819.

PHILLIPPS
and Wife

vs.
REED.

Mr. Serjt. Copley, *contra*.—The words contained in the statute are express and general, and cannot receive a limited construction. The Courts at *Newfoundland* have jurisdiction over the insolvent's effects and property in *England* as well as in that country, and are empowered to seize and dispose of the same previous to the granting of the certificate. They are authorized to collect and dispose of all debts due to the insolvent generally. The sixth clause does not cut down the generality of that relative to the certificate. But even, by the former, the distribution is to be made among all the creditors. If, however, the eighth section stood alone, it is in terms sufficiently general and comprehensive to remove all doubt, and so far from being controlled, it is confirmed by those preceding it. The cases relative to the discharge of bankrupts who have obtained their certificates, have no application to the present, as this depends entirely on the construction of the sixth, seventh, and eighth clauses of the 49 Geo. 3. c. 27.

1819.
 ~~~~~  
 PHILLPOTTS  
 and Wife  
 v.  
 REED.

Mr. Serjt. *Lens* in reply.—As to the distribution of the insolvent's property among all his said creditors, as mentioned in the sixth section, the word "seized" can only have reference to those to whom notice was given. Creditors in this country had no notice of the proceedings that had taken place at *Newfoundland*; but the statute is confined to those who sued out the attachment, and the others resident in the island, who had received notice, and were known to be creditors of the insolvent. It has been said, that his effects might be seized in this country, but that is giving the statute too extensive an operation, for if his property here were liable to the process of that Court, there should have been some notice in the *Gazette* of his insolvency, which has not been given. The effect of the statute must be confined to the distribution of the insolvent's property at *Newfoundland* to his creditors there; and his goods cannot be sold or attached in this country by the order of the Court of that island. The statute, therefore, has a mere local application, and does not extend to cases of general insolvency, or to the effects of the insolvent in this country.

Lord Chief Justice DALLAS.—There certainly is great weight in the observations that have fallen from my Brother *Lens*, but the question is narrowed to the words contained in the statute itself. If they are in themselves plain and intelligible, although they might be productive of inconvenience, still the Court must be governed by them. In this case, the defendant was resident and carried on business at *Newfoundland*. He went there for the purpose of trading, and became insolvent in that island, and having obtained his certificate, we are now asked, whether he is not liable to a debt incurred before his insolvency? The eighth section of the statute, under which he has pleaded his certificate, enacts, "That if such insolvent person shall make a true disclosure and discovery of all his goods and effects

whatsoever, and shall conform himself to the order and direction of the Court there, the same shall and may (with the consent of one-half in number or value of his creditors) be certified by the said Court, and such certificate, when pleaded, shall be a bar to all suits and complaints for debts contracted within the island of *Newfoundland*, and on the islands and seas aforesaid, and on the banks of *Newfoundland*, and in *Great Britain* or *Ireland*, prior to the time when he was declared insolvent." If it was intended to confine the operation of the statute to *Newfoundland*, it ought to have stopped there, but the emphatical words, "*and in Great Britain or Ireland*," immediately follow. The debt in question was contracted in *Great Britain*, and it is not only difficult but impossible to say, that when these words are thus added they can be rejected. Although I have paid great attention to the argument, I have not heard how these latter words are to be construed. It is true that it would not be unjust to construe them with an equitable restriction. In this case the plaintiffs were creditors in this country, and had an equal right to the effects of the insolvent here, as his other creditors had at *Newfoundland*, and the Court there have a power to distribute the whole of his property as well between his creditors resident in this country as in that island. If all his effects be given up, there can be no doubt but that he is wholly discharged in future, and I think the words of the statute admit of that construction. The 6th section, after reciting that it would contribute to the advancement of the trade of *Newfoundland*, if the effects of persons becoming insolvent within that island, or on the banks thereof, were divided among their creditors with more expedition than had before been practised, enacts, "That as often as the goods and credits of any person shall be attached, and it shall be made to appear to the Court out of which the attachment issued, that the

1819.

PHILLPOTTS  
and Wife

v.  
REED.

1819.  
 ~~~~~  
 PHILLPOTTS
 and Wife
 v.
 REED.

goods and credits so attached were not sufficient to pay twenty shillings in the pound to all those who should be creditors, by reason of debts contracted within that island, or on the banks thereof, or in *Great Britain or Ireland*, that it should be lawful for such Court to summon the party whose goods and credits were attached, to appear before them on a certain day, in order that his effects might be collected and distributed." It is true that if the party were resident in this country, it would be difficult to summon him, and therefore it is contended that the general words must be restrained by the subject-matter—that there is no provision in the statute which entitles the creditors in *Great Britain* to share in the distribution of the insolvent's effects, but if, on his examination at *Newfoundland*, he be found to be insolvent, the Court there have a right to sell his effects without confining themselves to those he may have in that island, that therefore necessarily involves any property he may have in this country, and the whole is afterwards to be distributed rateably among *all* the creditors. The general terms, therefore, in the sixth section, are equally applicable to creditors in *England* as in *Newfoundland*. It is wholly unnecessary to advert to the terms of the seventh section, which relates to the mode of distributing the effects; but the eighth contains a general clause, and enacts, that in case of conformity by the insolvent, he may obtain his certificate of the Court, which, when pleaded, shall be a bar to all suits for debts contracted in *Newfoundland* and in *Great Britain or Ireland*, previous to his insolvency. I therefore think the words of the statute are plain, and that the defendant is entitled to judgment.

Mr. Justice PARK.—If this statute were imperfect in terms, we might be called on to put a construction on it, so as not to alter the intention of the legislature; but as this case is not touched by those statutes which have been

passed relative to certificates obtained by bankrupts, it is only necessary to advert to the terms contained in this particular statute, and the words used are, I think, sufficient for us to conclude that they are of a general nature, and not to be restrained by the subject-matter. There is very great weight in the distinction which his Lordship has taken between the sixth and eighth sections; although the language of the one is materially different from that used in the other, as in the preceding part of the former, it is enacted, that as often as the goods of any person shall be attached, and it shall be made to appear to the Court, out of which the attachment issued, that such goods were not sufficient to pay twenty shillings in the pound, it should be lawful for such Court to summon the party whose goods were attached, together with the plaintiff who sued out the attachment, and also such persons as were known to be creditors of the insolvent, to appear in Court on a certain day. It is true that such creditors may be considered to be those only as are known to reside within the jurisdiction, or to whom alone the process of the Court might extend; but in the latter part of that section, the Court, on finding the defendant to be insolvent, may collect and sell his effects, and distribute the produce thereof rateably amongst *all* his creditors. It is not necessary, therefore, after the party is declared insolvent, that his creditors shall be summoned in order to receive their distribution; besides, the prior part of that clause extended to all those who shall be creditors, by reason of debts contracted within the island of *Newfoundland*, or within *Great Britain* and *Ireland*. Although the seventh section provides as to the distribution of the insolvent's effects, and gives a priority to seamen employed in the *Newfoundland* fishery for wages, then to those persons who shall be creditors, for supplies furnished; and in the next place to those who shall have become creditors within two years

1819.

PHILLPOTTS
and Wife
v.
REED.

1819.
~
PHILLPOTTS
and Wife
v.
REED.

before the insolvency, yet it also provides for the payment of all other creditors equally, as far as the effects will go; this, therefore, must extend to those in *Great Britain* or *Ireland*; but the eighth section contains a general and exonerating clause, that the certificate, when pleaded, shall operate as a bar to all debts previous to the insolvency, whether they were contracted in *Newfoundland*, *Great Britain*, or *Ireland*. I therefore am of opinion that the defendant comes expressly within the provisions of this section.

Mr. Justice BURROUGH.—I am inclined to think there has been no oversight of the legislature in the forming of this statute, and that they did not intend its provisions should apply to the island of *Newfoundland* alone, but that it is equally applicable to those persons who become insolvent there, and who have previously contracted debts in this country, and that the general terms expressed in the statute are particularly applicable to the present case. The first, sixth, seventh, and eighth clauses, contain terms more or less general; although the seventh provides for the distribution of the insolvent's effects, and the creditors at *Newfoundland* have a priority, still that does not restrain its generality; for after they are satisfied, it is enacted, that all other creditors shall be paid equally, as far as the effects will go; the creditors here, therefore, are equally entitled, after the former have been satisfied, as those of *Newfoundland*, and this part of the section must extend to all the debts, credits, and effects of the insolvent whatsoever. The Court at *Newfoundland* have it in their power completely to control the granting of the certificate; and by analogy, by the bankrupt laws of this country, the property of an insolvent might be taken at *Newfoundland*, and the certificate, when pleaded, would be equally a bar to debts contracted in that country, as in this.

Mr. Justice RICHARDSON.—I am entirely of the same opinion. The cases relative to bankruptcy have no bearing whatever on this question, which depends entirely on the construction of the statute of the 49 Geo. 3, and the effect intended to be given to it by the legislature; and I think it relates to all debts contracted in *Newfoundland*, *Great Britain*, and *Ireland*, as well as to creditors resident in either of these countries. The first section extends the jurisdiction of the Court of *Newfoundland*, and by the sixth, the provisions as to persons becoming insolvent there, are carried farther than they were by the previous statutes; that section enacts, that the goods of the insolvent may be attached, and in pursuance of this provision, the effects of the defendant who was then resident in that country, were attached, when it appeared he was not able to pay his creditors their full demand; those creditors were not confined to persons with whom the insolvent had contracted debts within the island of *Newfoundland*, but extended to those who resided in *Great Britain* and *Ireland*, the insolvency therefore depended on all debts which he had contracted in either of these countries. As the Court at *Newfoundland* found that the defendant was insolvent, in pursuance of this section, he was summoned before them, together with the party who had sued out the attachment, and such persons who were known to be creditors of the defendant, to appear at a certain day. It has been very strongly contended, by my Brother *Lenz*, that those creditors must be confined to *Newfoundland* alone, as it could not be known that there were any in *England*, and that those only who were summoned could participate in the distribution of the insolvent's property; but this alone is not sufficient to narrow the operation of the other sections contained in this statute; although there were creditors who were not summoned, as well as others who could not attend, still if the insolvent conformed him-

1819.

PHILLPOTTS
and Wife
v.
REED.

1819.
~
PHILLPOTTS
and Wife
v.
REED.

self to the order and regulation of the Court, he would be entitled to the benefit of his certificate. The Court at *Newfoundland* had alone the power of declaring the defendant insolvent, and of proceeding to order for the discovery, collecting, selling, and distributing his effects; those effects, when collected, were not confined to his creditors at *Newfoundland*, but the produce thereof was to be rateably distributed amongst *all* his creditors; that therefore would extend to his general creditors, and for that purpose the Court there might authorise any one or more creditors of the defendant, who should be chosen by the major part of such creditors, to perform the same, that is, to collect and sell the effects and debts wherever they might be found. The creditors, therefore, appointed by that Court, will be in effect placed in the same situation as assignees in this country, for after the debts were collected, and the effects sold, a rateable distribution thereof was directed to be made among all the creditors of the insolvent. With respect to the first section, it merely gives a priority of distribution to some particular creditors; it merely shews that some may be preferred, but the residue is equally to be divided. This distinction, therefore, throws no light on the general question, but the words of the eighth section are as large and comprehensive as can be well conceived, and the certificate itself is a bar to all debts contracted previously to the insolvency. It has been said that it can only be so in certain cases, but I think there are no words in the previous sections to narrow the construction of this, and that it must equally apply to all debts contracted either in this country or at *Newfoundland*, previous to the discharge of the insolvent, whether he were resident in either of those countries.

Judgment for the Defendant.

MARTIN and Others v. MORGAN and Another.

1819.

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 Wednesday,
 June 23.

THIS was an action of *assumpsit* for money had and received, and brought by the plaintiffs, who were bankers in *London*, to recover the sum of £995 : 15s : 7d. being the amount of a check paid by them, and drawn for the use of the defendants by persons named *Burmester* and *Vidal*, under the following circumstances. It appeared at the trial of the cause, before Lord Chief Justice *Dallas*, at *Westminster*, at the Sittings after the last Term, that *Burmester* and *Vidal* were merchants, and kept an account with the plaintiffs as their bankers. That they had also dealings with the defendants, whom they employed as brokers, to purchase and sell seeds ;—that *Burmester* and *Vidal* being in embarrassed circumstances, they, in the month of *November* last, applied to the defendants for a pecuniary accommodation, who accordingly accepted two bills, drawn by *Burmester* and Co. upon them, amounting together to £2028 : 19s : 4d. they holding, as a security against their liability upon such acceptances, some seed belonging to *Burmester* and Co. A short time before those bills became due, *Burmester* and Co. stated to the defendants that they were incapable to provide funds to take them up, when it was arranged that the defendants should accept new bills for nearly the same amount, to be drawn upon them by the house of *Minet* and Co. which new bills *Burmester* and Co. were to get discounted, and bring the proceeds to the defendants, in order to put them in cash, to meet the first set. New bills were accordingly drawn by *Minet* and Co. one for £995 : 15s : 7d. and the other for £1000, which were accordingly accepted by the defendants, who received from *Burmester* and Co. as a farther security, two post dated checks, drawn on the

The defendants knowing a check to be post dated, and that the drawers were insolvent, presented it for payment to the plaintiffs, who were bankers, and who, without knowledge of these facts, paid its amount, although they had no funds of the drawers in their hands at the time, but expected some in the course of the day. Held: they were entitled to recover it back, in an action for money had and received.

1819.

MARTIN
and Others

v.

MORGAN
and Another.

plaintiffs for the same sums, payable on the 19th and 22d of *February*, being the days on which the first set of bills would respectively become due; the new bills and checks were both drawn on the 9th. The bills were discounted through the medium of *Minet* and Co. who paid over the proceeds to *Burmester* and Co. by whom the money was deposited in the plaintiff's banking house to be placed to their account. The defendants having afterwards learnt that their last acceptances had been discounted, and that *Burmester* and Co. had received the money on the 13th of *February*, applied to them for it, when they said that they could not pay it; the defendants then pressed *Burmester* and Co. for payment of the first of the checks, amounting to £995 : 15s : 7d. which they also declared they were unable to pay, and acknowledged that the money had been applied to other purposes. They then said that the house of *Minet* and Co. would assist them, and they accordingly went there with one of the defendants; *Minet* and Co. having inspected the books of *Burmester* and Co. refused to become security, and intimated their belief that *Burmester* and Co. were insolvent. On the day on which the first of the defendants' first set of acceptances became payable, and also the day on which the check in question bore date, one of the defendants called on *Burmester* and Co. and threatened to present the check, unless the money was immediately paid, when *Burmester* informed him, that there were not sufficient funds in the hands of the plaintiffs, and requested him not to present the check. The defendant then said that he would wait till four o'clock on that day, and that unless he received the money from *Burmester* and Co. before that time, he would present the check. He did not wait until four, but presented it at a quarter past three, and obtained payment, as the plaintiffs expected to receive funds from *Burmester* and Co. before the close of the

day, although they had not any in their hands at the time the check was presented. Before four o'clock *Burmester* and Co. sent a notice to the plaintiffs not to pay any more money on their account. At the time of the payment of the check in question, the plaintiffs were entirely ignorant of the insolvency of *Burmester* and Co. as well as of the transactions which had previously taken place between them and the defendants; neither were they aware that the check was post dated. Under the special circumstances of the case his Lordship directed a verdict to be found generally for the defendants, with liberty for the plaintiffs to move to set it aside.

1819.

 MARTIN
 and Other
 v.
 MORGAN
 and Another.

Mr. Serjt. *Cross*, in the absence of Mr. Serjt. *Copley*, on a former day in this term, had accordingly obtained a rule *nisi* that this verdict might be set aside, and a new trial granted, on two grounds, first, that the defendants had knowledge of the insolvency of *Burmester* and *Vidal*, as well as notice that they had no funds in the hands of the plaintiffs at the time the check was presented; and, secondly, that the money was illegally obtained from the plaintiffs upon a post dated check, of which their clerk was ignorant at the time of the payment made.

Mr. Serjt. *Vaughan* now shewed cause. Both the justice and law of this case are with the defendants. *Burmester* and Co. were indebted to them in a far larger sum than the amount of the check in question, and they were *bonâ fide* creditors at the time the payment was made. As the plaintiffs paid to the order of *Burmester* and Co. they are estopped from recovering the amount of this check from the defendants, who had a most unquestionable right to retain it as between themselves, and *Burmester* and Co. If a person gives a post dated check to another, and tells him that the banker or agent will pay it on pre-


1819.

MARTIN
and Others
v.
MORGAN
and Another.

sentment, if such banker pay it, it cannot be recovered back, as he must be considered the mere agent of the party. If *Burmester* and Co. had been solvent, the plaintiffs might have recovered this sum as money paid to their use, and given the check in evidence of such payment. Until the passing of the 55 Geo. 3. c. 184, s. 13 (a), the post dating a check was not deemed to be illegal. On

(a) By which it is enacted, "That for the more effectually preventing of frauds and evasions of the duties thereby granted, on bills of exchange, drafts, or orders for the payment of money, under colour of the exemption in favour of drafts or orders upon bankers, or persons acting as bankers, contained in the schedule thereto annexed; that if any person shall make and issue any bill, draft, or order, for the payment of money to the bearer on demand, upon any banker or bankers, or any person acting as a banker, which shall be dated on any day subsequent to the day on which it shall be issued, or which shall not truly specify and express the place where it shall be issued, or which shall not in every respect fall within the said exemption, unless the same shall be duly stamped as a bill of exchange according to that act, the person so offending shall, for every such bill, draft, or order, forfeit the sum of one hundred pounds; and if any person shall knowingly receive or take any such bill, draft, or order, in payment of or as a security for the sum therein mentioned, he shall, for every such bill, draft, or order, forfeit the sum of twenty pounds; and if any banker, or any person acting as a banker, upon whom any such bill, draft, or order, shall be drawn, shall pay the sum of money therein expressed, or any part thereof, knowing the same to be post-dated, or knowing that the place where it was issued is not truly specified and set forth therein, or knowing that the same does not in any other respect fall within the said exemption, then the banker or person so offending shall, for every such bill, draft, or order, forfeit the sum of one hundred pounds, and moreover shall not be allowed the money so paid, or any part thereof, in account against the person or persons, by or for whom such bill, draft, or order, shall be drawn, or his executors, administrators, assignees, or creditors, in case of bankruptcy or insolvency, or any other person claiming under him."

looking at the terms of that section, the only effect is to render the party taking, the party receiving, and the party paying liable to certain penalties, but it does not appear by that statute that the check so presented is to be considered as null and void; nor is there any thing in the statute enacting, that money obtained by the payee of an illegal post dated draft, shall be deemed as paid without any consideration, and recoverable by the person who pays it. The plaintiffs were the mere agents of *Burmester* and Co. and paid the check merely for the honour of the drawers, although at the time it was presented they knew that they had no funds of *Burmester* and Co. to meet such payment. They, therefore, having broken their engagements with the defendants, and the check in question having been paid by the plaintiffs, for the honour of *Burmester* and Co. and on their behalf, such payment cannot now be recovered.

1819.

MARTIN
and Others
 v.
MORGAN
and Another.

Mr. Serjt. *Copley*, in support of the rule, was stopped by the Court.

Lord Chief Justice DALLAS.—I am clearly of opinion that in this case the plaintiffs are entitled to recover. It is a well known rule of law, that where a party pays money to another, voluntarily, with full knowledge, or even full means of knowledge of all the circumstances of the case, the party so paying cannot recover it back; but if such payment be made without such knowledge, or such means of knowledge, or the party obtaining payment has suppressed certain facts, or made fraudulent representations, the party paying shall recover it back. What are the facts of this case? As between the defendants and *Burmester* and Co. it is quite clear that the former had an equitable claim on the latter, but the question does not turn on the rights of these parties, but on the relative

1819.

MARTIN
and Others
v.
MORGAN
and Another.

situations of the plaintiffs as bankers and the defendants. The draft presented to the plaintiffs for payment was illegal in itself, being post dated ; if they had paid it with knowledge of its illegality, they would have been subjected to a penalty of £100. If they had even been apprised that it was concocted in illegality, they would not have paid it, but they were wholly kept in the dark by the defendants themselves, who were parties to, and guilty of the illegal transaction, and who now seek to retain that which they have so fraudulently obtained. There is no case where a party who has been instrumental in committing an illegal act, can recover money obtained from a third person, who is ignorant of such illegality. Here, in order to entitle the defendants to keep possession of this money, we must give validity to an illegal instrument. On this ground only, the plaintiffs are entitled to recover, but it is said, that as this was a voluntary payment, and as the plaintiffs knew that they had no funds of *Burmester and Co.* in their hands when such payment was made, they were not entitled to recover ; but they did not know before four o'clock on the day on which the check was presented, that they should have no funds from *Burmester and Co.*, on the contrary, they expected an immediate remittance. The defendants were previously aware that there would be no funds ; the plaintiffs' clerk, who paid the check, proved at the trial, that if it had been known to the plaintiffs there were no funds of *Burmester and Co.* on hand at the time the check was presented, it would have been paid, in expectation of receiving some before the close of the day. But the party presenting the check, not only knowing that no remittance would be sent from *Burmester and Co.* for that purpose, but also being fully aware of their actual insolvency, took care to present the check at the banking-house, and procure payment of it even before any notice could be received there from

Burmester and Co. requesting them not to pay any more of their checks, and that too though acquainted with the fact that the check was illegal. Can the defendants, therefore, either in point of Law, Justice, or Equity, be said to be entitled to retain the sum they have obtained under such circumstances?

1819.
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 MARTIN  
 and Others  
 v.  
 MORGAN  
 and Another.

Mr. Justice PARK.—I perfectly concur with my Lord Chief Justice. It is impossible to say in this case, that the parties stand on fair and equal terms. The defendants were fully aware of the illegality of the instrument, and held back such knowledge from the plaintiffs, who were unacquainted with the promise of the defendants to *Burmester* and *Vidal*, not to present the check; nor did they know that the drawers of the check were insolvent. The Law has never been doubted, that if a party pays money to another voluntarily, with full means of knowledge of all the circumstances of the case, the party so paying cannot recover it back again, as it may be considered to be a payment made in his own wrong; but in *Chatfield v. Paxton* (a), Mr. Justice *Ashhurst* held, that where a payment has been made, not with full knowledge of the facts, but only under a blind suspicion of the case, and it has been found to have been paid unjustly, the party paying might recover it back again; and although Mr. Justice *Grose* and Mr. Justice *Lawrence*, in that case, felt difficulty in adopting the opinion of Lord *Kenyon* and Mr. Justice *Ashhurst*, to the full extent, still they had no doubt as to the law of the case, but differed principally, because they were not satisfied that the plaintiff had not a sufficient knowledge of the ground of his defence before payment of the bill, which he had previously accepted. The case of *Bilbie v. Lumley* (b), is the leading decision

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(a) 2 East, 471, n.—(b) *Ibid.* 469.

1819.

MARTIN  
and Others  
v.

MORGAN  
and Another.

on this subject, and has been since frequently recognised; that case therefore must govern the present, and more particularly so, as the plaintiffs were not only ignorant of the facts, but the defendants themselves criminally withheld them from their knowledge.

Mr. Justice BURROUGH.—When this case was first mentioned, I thought the plaintiffs were not entitled to recover, but I now entertain an entirely different opinion; for the defendants themselves not only concealed from the knowledge of the plaintiffs the insolvency of *Burmester and Vidal*, but that the check, by means of which the plaintiff's money had been obtained by them, was post dated and illegal.

Mr. Justice RICHARDSON.—I am of the same opinion, and at the same time wish it to be understood, that I do not express any opinion whether the check, being post dated, makes any difference as to the plaintiff's right to recover, but that they are entitled on the ground that they did not stand on equal terms with the defendants; it appears that there was a communication between the defendants and *Burmester and Vidal*, that the money had been paid into the plaintiffs hands, and that the plaintiffs were not aware of their insolvency; the defendants, with full knowledge of the illegality of the check, and the circumstances of *Burmester and Co.* presented it, though they knew *Burmester and Co.* had no funds in the hands of the plaintiffs to answer it, they must therefore have been fully aware, that if the plaintiffs paid it, such payment would be an entire loss to them; this therefore brings this case within that of *Chatfield v. Paxton*, for the parties were not on equal terms, as the defendants withheld from the plaintiffs those facts which, if disclosed, would entitle them to withhold the payment. I therefore think that the plaintiffs are entitled

to recover both on the law and justice of this case, and that they are equally so on the facts, as they were totally ignorant of those circumstances of which the defendants had full knowledge.

Rule absolute (a).

1819.

MARTIN  
and Others  
v.  
MORGAN  
and Another.

(a) This cause was again tried before Lord Chief Justice Dallas, at the Sittings after Michaelmas Term, 1819, when the Jury found a verdict for the plaintiffs to the full amount of the check.

#### BLANCHENAY v. VANDENBERGH.

Friday,  
June 25.

Mr. Serjt. Pell, on a former day, had obtained a rule nisi, that the final judgment, signed upon the *postea* in this cause, as well as the taxation of the costs, and the issuing and execution of the writ of *feri facias*, should be set aside; on affidavits, which stated, that on the 15th instant, this Court was moved, that the plaintiff might pay the defendant his costs under the stat. 43 Geo. 3. c. 46, for a malicious arrest, which was refused; that in the evening of the same day a rule was obtained for the defendant's attorney to have notice to enable him to be present at the taxation of the plaintiff's costs, a copy of which rule was duly served at twenty minutes before nine o'clock on the same evening, but that judgment was signed, and costs taxed for the plaintiff, without any notice to the defendant's attorney, and that a *feri facias* and execution issued the next morning, being the 16th, and a levy was future, deliver over the *postea* until the morning after the *quarto die post*.

1819.  
BLANCHENAY  
v.  
VANDEN-  
BERGH.

made on the defendant's property ; that by the practice of this Court the associate ought not to have delivered the *postea* till the evening of the 15th, being the *quarto die post* ; that on the 17th, the associate being applied to by the defendant's attorney, to know when the *postea* was delivered, informed him that a clerk of the plaintiff's attorney called on the morning of the 15th, and requested the *postea*, to which request the associate replied, that it was not usual to deliver *postea*s till the evening ; when the clerk said, he only wanted to get it stamped, and promised not to take any proceedings on it till the following day, on the faith of which promise the associate delivered it to him.

Mr. Serjt. *Vaughan* yesterday shewed cause, and contended, that the proceedings were regular, as the action was tried on the 28th of *May*, when a verdict for £11: 18s. was found for the plaintiff, and that as the motion to tax the defendant his costs, was made and refused on the 15th instant, the costs might be taxed on the evening of that day, and that the costs had in fact been taxed before the plaintiff's attorney was served with the defendant's rule to be present at the taxation ; but

The Court thought that the *postea* ought not to have been delivered by the associate to the plaintiff's attorney, until the evening of the fourth day, and ordered the case to stand over, that inquiry might be made of the associate as to the grounds on which the *postea* had been obtained from him.

Lord Chief Justice DALLAS, on this day, said, that the Court having referred to the associate, he had certified that the *postea* had been taken away by the plaintiff's attorney, on the morning of the *quarto die post*, under an assurance

that the costs should not be taxed on that day; that the Court, in order to prevent a repetition of so sharp a practice, ordered that the *postea* should not be delivered by the associate in future, until the morning of the fifth day of the term, and that this rule must be made

Absolute.

1819.

BLANCHENAY  
v.  
VANDEN-  
BERGH.

## IN THE EXCHEQUER CHAMBER.

The KING v. FROUDE.

Saturday,  
June 26.

THE prisoner was indicted, at the last assizes for the County of Cornwall, under the 48 Geo. 3. c. 75 (a), as well for feloniously forging, as uttering and publishing as

An order was made under 48 Geo. 3. c. 75. s. 6., purporting on the face of it to be an order of a magistrate on the treasurer of a County, to allow one J. C. the expenses of burying a dead body cast on shore:—Held, that this was a forgery, although there was no such magistrate in the County, of the name of the person who signed the order, and although J. C. was not therein stated to be

(a) The 1st section of that statute requires "Church-wardens or overseers of the poor of the parish in which any dead human bodies shall be thrown on shore, to cause the same to be removed to some convenient place, and decently interred in the church-yard of such parish as speedily as possible, so that the expenses attending on such burial do not exceed the sum which at that time is allowed in such parish for the burial of any person buried at the expense of such parish." By the 5th section, it is provided, that "all necessary and proper payments, costs, charges, and expenses, which shall be made in, or incurred in or about the execution of that act, shall be made and paid by the church-wardens, overseer, constable, and headborough, for the time being, of such respective places as aforesaid;" and by the 6th section, it is enacted, that, for the purpose of reimbursing those officers for such payments, "it shall and may be lawful to and for any one Justice of the Peace for the County or place in which any such bodies shall have been so removed and buried as aforesaid, by any writing under his hand, to order and direct the treasurer for such County to pay such sum of money to such church-wardens and overseers, constable or headborough, for their costs and expenses in and about the execution of that act, (after the same should have been duly verified on oath), as to the said Justice shall seem reasonable and necessary; and such treasurer shall be and is hereby authorised to pay the sum of money so ordered and directed to be paid, to the persons empowered to receive the same; and such treasurer shall be allowed the same in his accounts."

a parish officer, or that the expenses incurred were necessary.

1819.  
 The KING  
 v.  
 FROUDE.

true, knowing it to be forged, a warrant for payment of £3. 5s., and purporting to be given under the hand and seal of one *John Pernown*, who was described as one of His Majesty's Justices of the Peace for the County of *Cornwall*; the tenor of the warrant was set forth in the indictment, charging the prisoner in some counts with intent to defraud the inhabitants of the County of *Cornwall*, and in others, stating the intention to be to defraud *Edward Coode*, the treasurer of that County. There were also other counts, stating the instrument to be an order for the payment of money, instead of a warrant. The warrant or order was as follows:—" *Cornwall*, to wit. To the Treasurer of the County Rates. Whereas it appeareth to me, one of His Majesty's Justices of the Peace, acting in and for the said County, that on the 1st day of *March*, now last past, a dead human body was cast on shore in the parish of *Zenar*, in the said County; and whereas *John Cose*, of the said parish, hath made oath before me, that he hath laid out the sum of £3. 5s. in and about the removal and burying of the said corpse, and which I allow to be the reasonable charges thereof; I do therefore hereby authorise and require you to pay the said sum of £3. 5s. out of the monies in your hands, to the said *John Cose*, or his order. Given under my hand and seal, this 21st day of *March*, 1818. *John Pernown*. (L. S.)"

At the trial of the prisoner before Mr. Justice *Holroyd*, at the last assizes at *Launceston*, his uttering and publishing as true the forged warrant or order in question, his knowledge that it was forged, and his intent to defraud, were fully proved. The uttering of the order was, (by producing and delivering it for payment, together with other similar forged orders), to the son of the treasurer of the County, who acted as such in his father's absence, and who, upon the prisoner's representing himself to be *John Cose*, the person named in the order, and to come from

the parish of *Zenar*, and that the person who signed the order was a magistrate of the county, paid him £52, being the amount of the sums contained in the several orders.

It appeared that there was no such magistrate as *John Pernown* in the County of *Cornwall*, nor such a person as *John Cose* in the parish of *Zenar*, and that no bodies had been buried by the prisoner.

1819.  
The KING  
v.  
FROUDE.

The Jury found the prisoner guilty;—when it was objected by his Counsel, that he could not be convicted on this indictment, which was founded on 7 *Geo. 2. c. 22.*, and the instrument in question was not in its purport a compulsory or even a valid order, within the statute 48 *Geo. 3. c. 75.* It not appearing on the face of it, that the person who was stated to have laid out the money, and to whom the payment of the money was ordered, was, nor had he represented himself to be, one of the officers of the parish or place, to whom, by the statute, a magistrate had authority to order a repayment. That the order must be compulsory, which this was not, because it did not state all that was sufficient to entitle the person to the payment of the money, and that the instrument also purported to be an order to pay to the person at whose expense the corpse was buried, and not to the officer of the parish or place who had repaid him. That by section 1, of the 48 *Geo. 3.*, the expenses attending on the burial were not to exceed the sum which at the time was allowed in the parish for the burial of any person buried at the expense of such parish, and that it did not appear by the order that the sum ordered to be paid did not exceed that amount, nor whether, according to section 5 of that statute, that sum was for the proper and necessary expenses only, and lastly, that there was no such magistrate in the County of *Cornwall* as *John Pernown*. The learned Judge thought, that



1819.  
 ~~~~~  
 The KING
 v.
 FROUDE.

though the order might not be compulsory, it was not in itself a nullity, nor was it made void by 48 Geo. 3., but was an order for the payment of money, and protected by the statute 7 Geo. 2. c. 22. The other points having been reserved, the question for the opinion of the twelve Judges was, whether the prisoner was rightly convicted? The case now came on for argument, when

Mr. C. F. Williams, for the prisoner, contended, that he was not.—He observed, that it purported to be an order of a magistrate of the County of Cornwall, made on the Treasurer of the County Rates, under the 6th section of 48 Geo. 3. c. 75. The whole of this statute must be construed together. The persons empowered to bury bodies cast on shore are by the 1st section appointed to be officers of the parish where such bodies may be thrown, and for this salutary reason, that they are consequently conversant with whatever wrecks or bodies may be cast on shore within the respective parishes in which they may be resident. They are also fully acquainted with the expences attending the funerals of parish poor. Notice of bodies cast on shore is required to be given to them only, whereby frauds which might otherwise be committed are entirely prevented. A magistrate can only make an order for payment within the provisions contained in the statute. This order is not within the statute, and is consequently nugatory and inoperative, and in fact may be considered as a mere nullity. The legislature have vested particular duties in church-wardens and overseers of the poor, who alone are entitled to be reimbursed in this particular instance for the expenses paid by them for the interment of bodies cast on shore; but this order does not state that the person who was to receive the money from the treasurer was a church-warden, or any other parish officer, or that such officer had duly verified the sum paid by him

on oath. A magistrate has no power to order the payment of money to any other persons than the officers named in the act, after the due verification of the expenses on oath. The prisoner neither being a parish officer, nor stated as such in the order, the provisions in the statute would be defeated, if a magistrate were empowered to make an order on the treasurer for payment to any indifferent individual. Besides, the signature to the order was not that of a magistrate; for it was proved, that there was no magistrate of that name in the whole of the County; but supposing it to have been so, still it was not compulsory on the treasurer to pay, on the above order, as the requisites of the statute had not been complied with. For it should have stated in express terms, that the person applying for payment was either a church-warden, or other officer of the parish, where the interment had taken place. In the case of *Rex v. Moffat* (a), it was held, that forgery of a bill of exchange, as such, cannot be committed where it is drawn for more than £20, and less than £5, without mentioning the place of abode of the payee, and having a subscribing witness thereto, being in such case declared absolutely void by the statute 17 Geo. 3. c. 30. So here the order was void, as the magistrate was only empowered to order the treasurer to reimburse the expenses of the parish officers requiring payment. There, the bill was held to be void, unless the name and place of abode of the payee was inserted therein; but although the order is in itself void, it may still be said that the treasurer might pay it, but he was not compelled to do so, as the payment was directed to be made to an individual without stating him to be a parish officer. If the

1819.
 The KING
 v.
 FROUDE.

(a) 2 *East's Pleas of the Crown*, 954. S. C. 1 *Leach's Crown Law*, 4th edit. 431.

1819.
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 The KING  
 v.  
 FROUDE.

treasurer had refused payment, and an indictment had been preferred against him for disobedience to the order, and on its production it had been found to be defective, the indictment must have been quashed. *Wall's case* (a) was decided on the same principle as that of *Rex v. Moffatt*. Here, although the instrument was made with an intent to defraud, still it was void and inoperative on the face of it, first, because there was no such magistrate as the signature imported, and secondly, the sum demanded was not made payable to a church-warden or other parish officer. In *Rusel's case* (b), it was held, that an instrument charged to be forged, was not a receipt for money, within the meaning of 2 Geo. 2. c. 25., as it was a confused memorandum, from which it was impossible to collect, with any certainty, whether the word "received" referred to the items of costs, or to any of the immaterial items of which the note was formed, but that instrument bore a nearer resemblance to a receipt for payment of money, than the order in question to a good and effective order on the treasurer for the payment of money, for the purpose for which it is presented. In *Rex v. Rushworth* (c), it was held, that a forged order for the purpose of obtaining a reward for the apprehension of a vagrant, was not a forgery within 7 Geo. 2. c. 22., unless it contain the requisites prescribed by the 17 Geo. 2. c. 5. s. 5., although it was in the same form as orders in the County where it purported to have been drawn usually were; and Mr. Justice Bayley (d) there said, "If the Justice of the Peace had any authority to make such an order it was derived from the statute, but he had no power to make

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(a) 2 *East's Pleas of the Crown*, 953.—(b) 1 *Leach's Crown Law*, 4th edit. 8.—(c) 1 *Starkie Rep.* 396.—(d) *Id.* 399.

such an order as that; and if such an one had been made, the treasurer ought not to have obeyed it." So here the Justice was not empowered to make an order on the treasurer to pay money to any but a parish officer; for by so doing, he would disobey the statute, from which alone he derives his authority, and the order being void, the treasurer ought not to have paid it.

1819.  
The KING  
v.  
FROUDE.

[Mr. Justice *Bayley*.—In that case there were two indictments, one for forgery, and another for obtaining money under false pretences. I directed an acquittal on the former, and the opinion of the Judges to be taken on the latter, who thought it bad. It was an indictment, under 17 *Geo. 2. c. 5. s. 5.*, for addressing an order to the Treasurer of the West Riding of *Yorkshire*. I thought it insufficient, because the order was addressed to the treasurer, instead of the high constable, as required by that section, and because it was not under seal of the person by whom it purported to have been made.]

[Mr. Justice *Holroyd*.—The 18th section of the 17 *Geo. 2. c. 5.* subjects the party forging such an order to a penalty of £50.] That is so stated in the case of *Rex v. Graham (a)*; which is a mistake; for on looking into the statute, that penalty is imposed by that section on persons who forge certain certificates, receipts, and notes, mentioned in the act, but has no reference whatever to such an order for payment of money. This case is distinguishable from those of *Rex v. Lockett (b)*, and *Rex v. Mitchell (c)*. In the former, the instrument was founded on a mercantile transaction, and purported upon the face of it to be such an one as was generally used by mercantile men; no defect was apparent; and if it had been genuine, it would have

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(a) 2 *East's Pl. Cr.* 945.—(b) *Id.* 940. S. C. 1 *Leach's Crown Law*, 4th edit. 94.—(c) 2 *East's Pl. Cr.* 936.

1819.  
 The KING  
 v.  
 FROUDE.

been a valid instrument ; but here the instrument must be framed according to the express provisions of the statute. It is not of a negotiable nature ; but the sum ordered to be paid can be paid only to one class of individuals who should be described therein. The case of *Rex v. M'Intosh* (a) was decided on the 32 Geo. 3. c. 34. s. 2., and the order itself purported on the face of it to be made at another place beyond the limited distance required by that statute. In *Rex v. Graham*, as well as in *Rex v. M'Intosh*, the orders appeared to be correct, and were properly directed, but the order here does not purport to have been verified on the oath of a parish officer, or that a payment was to be made by the treasurer to one. It is therefore bad in point of form, and the prisoner is entitled to his acquittal.

Mr. *Carter*, for the Crown, contended, that this, being an order for the payment of money, fell within the provisions of the statute. If it appear on the face of an instrument of this description, that the party assumed to draw it for the purpose for which it was intended, namely, for the payment of money, it falls within the act. In the cases that have been cited for the prisoner, the orders were mere nullities, if the directions of particular statutes were not complied with ; but here the statute is entirely silent as to the form of the order. A magistrate is merely empowered to make an order, by any writing under his hand, directing the treasurer to pay such sum to the parish officers, as he may deem reasonable. If such order be made by a magistrate, it is sufficient, and the treasurer is obliged to pay, whatever the form of it may be ; if the order, when made in respect of the burial of a dead body,

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(a) 2 *East's Pl. Cr.* 942. S. C. 2 *Leach*, 4th edit. 883.

1810.  
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 The KING
 v.
 FROUDE.

even purport to be made by a magistrate, it is sufficient ; and it appears to have been made by a magistrate, having jurisdiction over the subject-matter, and such order is good, though the person to whom the money is to be paid, be not described therein as a church-warden, or other parish officer. The presumption is, that the person named in the order was a parish officer, for it states that the dead body was found on the shore, and that a person, of the parish where it was found, had made oath, that he had expended money in its burial ; this cannot be presumed to be a third person, but one of the parish officers appointed by the statute to receive it, and it need not set out the description of such person. The sum to be allowed is not confined to the funeral expenses only, but to the removal as well as the burial. It is not necessary that the order should allege that the expenses incurred were reasonable, for the Justice may allow any sum he may think reasonable. There are many cases where instruments have been held to be forged, although there be apparent faults upon the face of them. In *Fitzgerald v. Lee* (a), where a will began, describing the testator to be *Peter Perry*, and ended with the christian name of *John*, it was held sufficient for the purpose of conviction. So in *Gade's case* (b), an indictment for forging a transfer of stock was good, although the stock had never been accepted by the person in whose name it stood, and although the transfer was not witnessed according to the rules and directions of the Bank. *Admiral Bradby's case* was tried before Mr. Justice *Burrough*, at *Winchester*, on an indictment for forging a receipt for

(a) 2 *East's Pl. Cr.* 963. S. C. 1 *Leach's Crown Law*, 4th edit. 20.—(b) 2 *Leach's Crown Law*, 4th edit. 132. S. C. 2 *East's Pl. Cr.* 874.

1819.
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 The KING  
 v.  
 FROUDE.

money to be paid to persons bringing letters by ship from abroad to this country, and delivering them at the port of arrival, as directed by statute 9 Ann. c. 10. s. 16. The prisoner gave the post-office at Gosport a receipt for £3. 11s. for ship letters; but it did not appear, on the face of the receipt, that he was a person to whom the reward was to be given, as such person, appointed by the statute to receive the money, must be either the master of the vessel, or one of the passengers or crew. In *Rex v. Rushworth* (a), it did not appear that the person making the order was a magistrate, and the jurisdiction was not questioned.

[Lord Chief Justice Abbott.—Where a magistrate is empowered to do an act, it is presumed that he has jurisdiction, but here he had only jurisdiction to order payment to the church-warden, or other parish officer, and it is not stated in the order that the person who was to receive the money, was such officer.] The order was perfectly conformable to the statute, and it must *prima facie* be intended that Cose was a parish officer, and that the magistrate was satisfied of his being so before he signed it. If the order were not void in itself, on the face of it, but would be a good voucher for the treasurer, in the settlement of his accounts, it would have been quite sufficient for him to establish a payment made under it.

Mr. Williams, in reply.—Even if the magistrate were authorised to make the order in question, still it would not be good, but the only person whom the treasurer has power to pay is not mentioned in it, *namely*, the church-warden, overseer, or other parish officer. This instrument therefore is clearly illegal. If the person had signed his

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(a) 1 Stark. Rep. 396.

name, without stating himself to be a magistrate in the body of the order, it would be very different; or if the statute had not directed the money to be paid to particular persons; but every order for the payment of money must be founded on a legal instrument; and in the present, such as the statute required. In all the cases that have been cited for the Crown, the instruments on which the indictments were founded were perfect in themselves, except as to the signatures of the persons making them; but here the *vice* is fully apparent on the face of the order.

1819.  
The KING  
v.  
FROUDE.

*Cur. adv. vult.*

No judgment was given in this case, although a majority of the Judges thought the order a forgery; but the prisoner was pardoned, on condition of being transported for life.





1819.

## IN THE EXCHEQUER CHAMBER.

Saturday,  
June 26.

The KING v. PAGE.

A bankrupt having surrendered to his commission, refused to answer certain questions put to him by the commissioners relative to the disposition of some of his property;—Held that this did not amount to felony within 5 Geo. 2. c. 30. s. 1.

In an indictment against a bankrupt, he was charged in feloniously making default in not submitting to be examined. *Query* whether this is sufficient without charging him with a refusal to surrender and submit to examination?

A person lay in prison two months for debt, subsequently to a criminal process which had been discharged:—Held, that this constituted an act of bankruptcy, though it did not appear that he had personal notice of his discharge.

THE prisoner was indicted on stat. 5 Geo. 2. c. 30. s. 1. (a) for that he being brought before certain commissioners

(a) By which it is enacted, "That if any person shall, at any time hereafter, become bankrupt, against whom a commission of bankrupt under the great seal of Great Britain hath been awarded and issued out, whereupon the person against whom such commission hath issued, or shall issue, hath or shall be declared bankrupt, shall not, within forty-two days after notice thereof in writing, to be left at the usual place of abode of such person, or personal notice in case such person be then in prison, and notice given in the *London* gazette, that such commission is, or has been issued, and of the time and place of a meeting of the commissioners therein named, surrender himself to the commissioners named in the said commission, or the major part of them, and sign or subscribe such surrender, and submit to be examined from time to time upon oath, or being of the people called quakers, upon the solemn affirmation by law appointed for such people, by and before such commissioners, or the major part of them, by such commission authorised, and in all things conform to the several statutes already made and now in force, concerning bankrupts, and also upon such his examination, fully and truly disclose and discover all his effects and estate real and personal, and how and in what manner, to whom, and upon what consideration, and at what time or times he hath disposed of, assigned, or transferred any of his goods, wares, merchandizes, monies, or other estate and effects (and all books, papers, and writings thereunto), of which he was possessed, or in or to which he was any ways interested or intitled, or which any person had in trust for him, or for his use, at any time before or after the issuing of the said commission, or whereby such person, or his family, hath or have, or may have, or accept any profit, possibility of profit, benefit, or advantage whatsoever, except only such part of his estate and effects as shall have been really and *bonâ fide* before sold or disposed of, in the way of his trade and dealings, and except such sums of money as shall have been laid out in the ordinary expenses of his family; and also upon such examination deliver up unto the said commissioners, by the said commission an-

of bankrupt, under a commission of bankruptcy that had been issued against him feloniously, did *not submit* from time to time to be examined upon oath, (he not being of the people called quakers) by and before the commissioners in the said commission named, or the major part of them by such commission authorised, and in all things conform to the several statutes made and in force at the time of the making and passing a certain act of parliament in the fifth year of the reign of his late Majesty King *George* the Second, intituled "An act to prevent the committing of frauds by bankrupts," and *fully* and truly disclose and discover *all* his estate and effects real and personal, and how and in what manner, and to whom, and upon what consideration, and at what time or times he had disposed of, assigned, or transferred any of his goods, wares, or merchandizes, monies, or other estate and effects, (and all books, papers, and writings, relating thereunto), of which he was possessed, or in, or to which he was anyways interested or entitled, or which any person or persons had, or had had, in trust for him, or for his use, at any time before or after the issuing of the said commission, or whereby he the said *George Page*, or his family had, or might have, or expect any profit, possibility of profit, benefit, or advantage whatsoever, except only such part of his estate and effects as had been really

1819.

The KING  
v.  
PAGE.

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thorized, or the major part of them, all such part of his the said bankrupt's goods, wares, merchandizes, money, estate, and effects, and all books and papers, and writings, relating thereunto, as, at the time of such examination, shall be in his possession, custody, or power, then he the said bankrupt, in case of any default and wilful omission in not surrendering and submitting to be examined as aforesaid, or in case he shall remove, conceal, or embezzle, any part of such his estate real or personal, to the value of £20, or any books of account, papers, or writings, relating thereto, with an intent to defraud his creditors, (and being thereof lawfully convicted by judgment or information), shall be deemed and adjudged to be guilty of felony, and shall suffer as felons, without benefit of clergy, or the benefit of any statute made in relation to felons."

1819.  
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The KING  
v.  
PAGE.

and *bonâ fide* before sold and disposed of in the way of his trade and dealings, &c. except such sum of money as had been laid out in the ordinary expense of his family, and deliver up unto the said commissioners, by the said commission authorised, or the major part of them, all such part of his the said *George Page's* goods, wares, merchandizes, monies, estate, and effects, and all books, papers, and writings, relating thereto, as at the time when the said *George Page* was so first before *Henry Revell Reynolds*, *Robert Joseph Chambers*, and *Joseph Hickey*, the major part of the said commissioners in the said commission named and authorised, to wit, on the 3d day of *October*, in the 58th year of our Lord the now King, at *Guildhall* in *London* aforesaid, were in his possession, custody, or power, (the necessary wearing apparel of him the said *George Page*, and the necessary wearing apparel of the wife and children of the said *George Page* only excepted,) but feloniously did make default and wilful omission, in not submitting to be examined as aforesaid, to wit, on, &c. at, &c. aforesaid, with intent to defraud the creditors of him the said *George Page*, against the form of the statute in such case made and provided (a).

The prisoner was tried at the *Old Bailey*, before Mr. Justice *Best*, on the 17th of *February* last, when it appeared that he was brought before the commissioners on the 3d of *October*, 1818, being the last day appointed for

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(a) The indictment contained three counts; the first set out the whole of the proceedings under the commission, and charged the prisoner with feloniously refusing, and a wilful omission in not submitting to be examined as above. The second with feloniously making default and wilful omission in not submitting to be examined; and the third charged him with felony, in not submitting, from time to time to be examined.

1819.  
 ~~~~~  
 The KING
 v.
 PAGE.

his surrender and examination, that he took the oath administered to him by the commissioners, and that on being asked whether he had £500 in his possession or under his controul, he said he was not prepared to state any thing, or enter then into an examination, and that he was going to petition the Lord Chancellor, or proceed at law, to supersede the commission. He was again brought before the commissioners on the 7th of *November* following, at *Guildhall*, and on being re-examined as to whether he had the £500 in his possession or not, he declined to answer, assigning the same reasons as before. On the 28th of *November*, he was also brought before the commissioners, who apprized him that he was bound to disclose his effects, and interrogated him as to the disposition of his property, when he again declined to answer any of the leading questions put to him.

It was objected on the part of the prisoner, that he, having surrendered to his commission, and taken the oath, could not be guilty of felony by giving insufficient answers to the questions put, or declining altogether to answer them. The learned Judge told the Jury that the prisoner's answers were insufficient, and that to many very proper questions he had declined giving any answer; and he further told them, that if the conduct of the prisoner, in giving insufficient answers to some of the questions, and refusing to answer others, proceeded from an intention to defraud his creditors by preventing them from getting at his property, that he was guilty of felony within the statute on which he was indicted. But, if they thought that the prisoner believed he was not a bankrupt, and that he was not bound to be examined, or, that he should prejudice his rights to supersede his commission; in that case his conduct could not be said to proceed from an intent

1819.
 The KING
 v.
 PAGE.

to defraud his creditors, and that his case was not within the statute.

The Jury convicted the prisoner.

The first question for the opinion of the Judges, now was, whether the Jury having found that the insufficiency of the prisoner's answers, and his refusal to answer questions, proceeded from an intent to defraud his creditors, he was properly convicted?

The act of bankruptcy, on which the commission against the prisoner was founded, was his lying in prison from the 4th of *June*, 1818, to the 15th of *August*, in the same year. On the 14th of *April*, 1818, the prisoner was committed to *Newgate* by the warrant of a magistrate, upon the certificate of the commissioners of bankrupts, under a commission that had been issued against him, which commission was afterwards superseded. On the 16th of the same month, he was brought by *Habeas Corpus* into the *King's Bench*, and surrendered in discharge of his bail, in several actions, but it appearing that he was charged with the magistrate's warrant, he was taken out of the custody of the marshal and re-committed to *Newgate*, charged with the actions and warrant. On the 18th of *April*, the commissioners acting under the first commission, caused the prisoner to be brought before them, and committed him to *Newgate* for refusing to be sworn, or to give any account of his property. On the 24th of *April*, the same commissioners again committed the prisoner for refusing to answer certain questions put to him. On the 27th of *April*, the prisoner was discharged by the Court of *King's Bench*, from the warrants dated the 18th and 24th of *April*, and he was re-committed by

the Court, until he should submit himself to be examined by the commissioners named in the commission, or the major part of them. On the 12th of *May*, the commissioners certified, that they did not further intend to examine the bankrupt, and that they consented to his discharge, if the Court of *King's Bench* thought proper to discharge him from imprisonment under their rule. On the 15th of *May*, 1818, he was brought by *Habeas Corpus* from *Newgate*, and committed by Mr. Justice *Holroyd* to the *King's Bench* prison, charged with the different actions on which he was detained, and also with the warrant and rule of the *King's Bench*. On the 4th of *June*, an order of Mr. Justice *Abbott* was obtained by the prisoner's attorney (which was drawn up on the 5th), which discharged the prisoner from all the detainers against him, except those in the civil causes. That order was obtained in term time. It was not made a rule of Court, and *was not acted upon*, and the prisoner remained in the *King's Bench* prison, till the 15th of *August*, 1818, when the commission of bankrupt issued against him, under which he was required to be examined on the 3d of *October*, 1818. It was insisted on the part of the prisoner, that although he continued in the *King's Bench* prison, from the 4th of *June* to the 15th of *August*, charged with debt, yet, as the magistrate's warrant, for which he was detained until he should be discharged by due course of law, was not got rid of, and the rule of the Court of *King's Bench*, (and which it was insisted was not discharged by Mr. Justice *Abbott's* order), was still in force, the prisoner was not detained merely for debt, and that such detainer was therefore no act of bankruptcy. The case of *Ex parte Bowes (a)*, was referred to. The learned Judge thought

1819.
 The KING
 v.
 PAGE.

1819.
The KING
v.
PAGE.

that as the prisoner could at any time get rid of those warrants of commitments, and the rule of the *King's Bench*, by submitting to be examined, his case was not like that of *Bowes*, who was detained in prison under a judgment for a crime of which he had been convicted; and he was also of opinion that Mr. Justice *Abbott's* order did not discharge the rule made by the Court, but liberated the prisoner upon the occurrence of a new circumstance, subsequent to the making the rule, viz. the certificate of the commissioners that they did not intend to proceed any further under the commission of bankrupt.

If the prisoner who obtained that order, had acted on it, he might have been discharged from every detainer, except those on account of debts, therefore his lying in prison was an act of bankruptcy.

The second question therefore, for the opinion of the Judges, was, whether the prisoner's lying in prison, under the circumstances above stated, was an act of bankruptcy? The cause now came on for argument, when

Mr. Serjt. *Copley*, for the prisoner, premised, that he was charged in the indictment with not submitting to be examined, on oath before the commissioners, but that he feloniously made default and wilful omission to be so examined. It appeared by the evidence adduced at the trial, that he not only surrendered himself as required by the statute, but was summoned before the commissioners, took the necessary oath, and was in fact examined as to the extent of his property, when some questions were asked him by the commissioners, which he declined answering, at the same time assigning his rea-

sans for so doing. The question then is, whether this amounts to felony? It cannot be so within the 5 Geo. 2. c. 30. s. 1. for that section merely enacts, "That if any person who shall become bankrupt, shall not surrender himself to the commissioners named in the commission, or the major part of them, and sign or subscribe such surrender, and submit to be examined from time to time upon oath, he shall be deemed guilty of felony;" and, by a subsequent clause contained in the 16th section, "Bankrupts or other persons refusing to answer interrogatories of the commissioners, they may by warrant under their hands and seals commit such persons to prison, till they shall submit themselves to the commissioners, and fully answer to their satisfaction." On the construction of the whole of that statute it follows, that where a bankrupt has surrendered, signed his surrender, appeared before the commissioners, taken the oath, and his examination has commenced, he has complied with all the requisites of the statute; and if he refuse to answer any questions put to him in the course of that examination, he is not thereby guilty of felony; but in case of such refusal the commissioners may commit him to prison. All that the statute requires is for him to surrender himself, and the penalty of death cannot be said to attach, if he either refuse to answer or give an unsatisfactory answer to any question, put to him by the commissioners, but if he do, they are empowered by the 16th section to commit him, till he give a full and satisfactory answer.—But the indictment is bad in form, and does not charge the prisoner with a felony within the express words and terms of the 5 Geo. 2. c. 30. s. 1. which enacts, "That a bankrupt shall be guilty of felony in case of any default and wilful omission in not surrendering and submitting to be examined." By the indictment the prisoner is not charged with not surrendering, but merely with not submitting to

1819.
 The KING
 v.
 PAGE.

1819.
 ~~~~~  
 The KING  
 v.  
 PAGE.

be examined, and no default of not surrendering and submitting is there charged: the prisoner had in fact surrendered, and consequently that charge was omitted in the indictment. The first clause of the statute as to the surrender and submission to be examined is in the conjunctive, and unless there is a non-compliance with the whole it is not a felony; the default in that section consists of two parts; the one in not surrendering, and the other in not submitting to be examined, both of which ought to have concurred before the bankrupt could be deemed guilty of felony, and in order to constitute that offence the default should have been stated in both instances in the indictment. In order to warrant the omission of the prisoner's not having surrendered in the indictment, the word "and" in the statute, must be construed as "or," to make this offence felony, but that cannot be done, as this is a penal statute, and must be construed strictly; besides which, the conjoined offences are particularly specified in the statute, and the offence therefore laid in the indictment is only part of that described in the statute. But there is another material objection to the form of the indictment, for when a person is charged with an offence under a statute, the indictment in describing the offence, must follow the very words of the statute, and the relative order in which they stand. The indictment here charges the prisoner in not submitting, from time to time, to be examined, but by the statute this must be taken to be coupled with the preceding words "in not surrendering;" for the offence described in the statute is not refusing to submit to be examined from time to time, but the omission of the bankrupt's not surrendering and submitting to be examined is one act. When the bankrupt has surrendered and signed his surrender, the first clause in the statute is complied with, the words of the statute, and the indictment therefore differ

materially in substance. The submission is one act only, whereas by the indictment the offence appears to consist of a succession of submissions; but there is only one submission to be made by the prisoner, to be examined from time to time; but farther, the words of the indictment should follow the statute with the greatest precision as to the nature of the offence, a different construction than this would be adverse to principle, and render the statute itself inconsistent. If a bankrupt refuse to answer a question relative to his property, it amounts to a concealment, and according to the construction contended for by the Crown, that concealment would amount to felony, however trifling the value of the property concealed might be; but by the statute such concealment is not a *capital* offence, unless it amount to the value of £20; a refusal therefore to answer concerning property amounting to less than that sum, cannot be considered as amounting to felony.—An officer of the Court has stated that no indictment of this description can be found, and that all the precedents relative to offences of this nature, charge the bankrupt with not surrendering *and* submitting to be examined according to the terms of the statute. With respect to the second question, namely, whether the prisoner's lying in prison under the circumstances of this case was an act of bankruptcy or not, it is wholly beside the indictment. By the statute 21 Jac. 1. c. 19. s. 2. it is enacted, that "If any persons using trade, &c. on being arrested for debt, shall after such arrest lie in prison for two months or more upon that or any other arrest or detention in prison for debt shall be adjudged a bankrupt;" here the defendant was imprisoned under a criminal charge; and although detainers for debt were afterwards lodged against him, and he remained in prison more than two months after such detainers were lodged, still that does not amount to an act of bankruptcy. A person must be

1819.  
  
 The KING  
 v.  
 PAGE.

1812,  
The KING  
v.  
PAGE,

confined in prison for debt only, to bring him within the meaning of this clause. The warrant and rule of the Court of *King's Bench* were criminal charges, and the rule of Court was in operation when the prisoner was brought up to be charged in a civil action, and also to be remanded on the former warrant; but when a party is in custody on a criminal charge, although he be afterwards detained, and lie two months in prison, still that is not an act of bankruptcy. In *Ex parte Bowes* (a), it appeared that where a person was in prison on a criminal sentence in execution, and charged with debts during the course of that commitment, such detention was not a lying in prison within the meaning of the act; and Lord *Loughborough* there said (b), he had considerable doubt whether upon the construction of the bankrupt laws, it was not of essential necessity that the lying two months in prison should be upon a case of imprisonment founded in debt and nothing else; and that it appeared to him the legislature intended it to be a case of imprisonment founded on debt, and that they could not have expressed themselves more clearly. On both grounds therefore, the prisoner is entitled to his acquittal.

Mr. Serjt. *Bosanquet*, for the Crown. In this case there are two points for consideration. The first is, whether the prisoner be guilty of felony within the 1st section of the 5 *Geo. 2. c. 30*? and if so, whether the indictment be sufficient in form to charge him with such felony; and secondly, whether the lying in prison two months under the circumstances detailed in this case, constitute an act of bankruptcy? As to the first, whether

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(a) 4 *Ves. jun.* 168.——(b) *Id.* 176.

it be incumbent on a bankrupt within forty-two days to surrender himself to the commissioners, applies not only to the surrender, but also to his submission to be examined upon oath, and answer all questions put to him by the commissioners touching his property; and if he does not answer the interrogatories that may be put to him by such commissioners, he is by that section guilty of felony. It is incumbent on him to comply with both these requisites; and the 16th section does not controul the operation of the first, the first part of which requires not only a surrender by the bankrupt, but his signature to it, a submission to be examined by the commissioners, and on such examination to make a full disclosure of all the property of which the bankrupt may be possessed; that therefore is clearly a submission to be examined for the purpose of a full investigation into his property which was to be delivered up to the commissioners; and lastly, that in case the bankrupt conceal any part of his property to the value of £20, with an intent to defraud his creditors, the statute enacts, that in case of default by the party, he shall be deemed to be guilty of felony, and shall suffer as a felon without benefit of clergy. In this case it is quite clear, that the prisoner evaded the questions put to him with intent to defraud his creditors, and on the facts of the case he did not surrender to be examined at all. If he had not come and surrendered till the forty-second day, and then refused to answer questions put to him, would he have complied with the first section of the statute, and would he be discharged from the felony by merely saying that he had come and surrendered? The examinations here have effected nothing but the gaining of a positive refusal of the prisoner to answer. The answers he gave to the questions put to him were submitted to the Jury, who found, that such refusal was bottomed in fraud, for he in fact refused to reply to any question which appeared

1819.  
 The KING  
 v.  
 PAGE.

1819.  
The KING  
v.  
PAGE.

to relate to the disclosure of his property. Unless the words "submit to be examined" can be struck out of the first section of the statute, the prisoner must be guilty of felony on his refusal of such submission, for the submission for examination is both the spirit and intention of the statute. It has been said, that the legislature did not intend that the bankrupt should be guilty of felony for merely refusing to answer a question, but that in case of refusal, the commissioners, by the 16th section, had the power of committing him until such time as he fully answered all questions put to him to their satisfaction. But that section relates not only to the bankrupt, but to other persons who may refuse to answer the commissioners, and is also connected with other times and matters than those contained in the first. Under the 16th section, the bankrupt may be committed by the commissioners *before* the forty-second day; but by the first the examination must take place within forty-two days, and it may be had on the last; and if he do not answer the questions put to him, and disclose his effects on that day, he is guilty of felony. The 16th section empowers the commissioners at all times even after the bankrupt has obtained his certificate to call persons before them, and examine them not only as to the bankrupt's estate, but touching all matters relative to the person, trade, dealings, and effects of such bankrupt, and any act of bankruptcy committed by him. As in terms therefore, it applies to other persons as well as to the bankrupt, it cannot control the operation of the first section. It has been said, that the indictment does not charge the prisoner with refusing to surrender; but it charges a refusal to be examined on the last day, he therefore could not be indicted for felony, until he had refused to be examined after the forty-second day; but on this part of the statute there is neither case nor precedent to be found. It has

been further contended for the prisoner, that the indictment ought to be framed on his concealment of the property; and that it does not appear the property so concealed amounted to £20, but the charge in this indictment is for a refusal to answer questions put to him, which is equally criminal as the concealing of his property, no averment therefore is necessary as to the amount of the property so concealed; had there been a former commission, it might have been necessary to aver that the property concealed at the time of the examination amounted to £20, and had it been averred it would have been necessary to have proved it. But the refusal to answer is of itself a capital offence, whether it be connected with the concealment of property or not. With respect to the second point, as to whether the bankrupt's lying in prison was an act of bankruptcy or not, it is wholly beside the 5 Geo. 2. c. 30; and it must receive the same construction in this case, as in those where the bankrupt is in prison under civil process. If a party be detained in prison under a criminal charge, it may not constitute a lying in prison within the statute; but that cannot apply where a prisoner is not prevented by such charge from going at large whenever he thought proper, here he might be said to have had the key of the prison in his own pocket, as the magistrate's warrant was void, or entirely put an end to, when the bankrupt was sent to prison by the commissioners; but even in *Ex parte Bowes (a)*, Lord Loughborough did not decide the question, whether where a man was in prison on a criminal sentence in execution, and charged with debts during the course of that commitment, it was a lying in prison within the meaning of

1819.  
 The KING  
 v.  
 PAGE.

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(a) 4 Ves. jun. 168.

1819.  
 ~~~~~  
 The KING
 v.
 PAGE.

the legislature. If a person commit an act of bankruptcy by departing the realm, such departure must be with an intention to defraud or delay creditors, and a party cannot take advantage of a criminal act, where his conduct is influenced by other motives also; for in *Raikes v. Poreau* (a), it was held, that where a party went abroad for the purpose of effecting a seduction, as well as to defraud his creditors; such going abroad was still an act of bankruptcy, although it might have been done with a view to the seduction alone; he also referred to *Vernon v. Hankey* (b). So here, the bankrupt having laid in prison two months, committed an act of bankruptcy, and being detained for debt comes within the letter of the statute of *James*, and he is also guilty of felony by having refused to be examined in pursuance of 5 Geo. 2. c. 30. s. 1.

Mr. Serjt. *Copley* in reply, contended, that the warrant of the magistrate and rule of Court were still in force, notwithstanding his detainer on a civil suit; that the former was issued under 5 Geo. 2. c. 30. s. 14. by which Justices of the Peace are empowered to grant warrants to apprehend bankrupts, and commit them to prison, from which the commissioners might have removed him in order to be brought before them for the examination and discovery of his effects; but here, not only that warrant, but the rule of Court were both in force. The bankrupt's lying in prison might amount to an act of bankruptcy to all civil purposes, but it could not do so when he was confined on a criminal charge; besides, it was proved at the trial that the bankrupt himself was

(a) *Cooke's Bankrupt Laws*, 73. S. C. 7 Term Rep. 511, n. — (b) *Cooke's Bankrupt Laws*, 73.

not aware that he was discharged from the criminal commitment. As to the first point the indictment is clearly bad in form, as it only charged him with not submitting to be examined when it should have subjoined a charge of refusal to surrender for they are concomitant acts, and constitute but one offence under 5 Geo. 2. c. 30.; and as both ought to have been stated in the indictment, so both should have been proved at the trial, he is charged with not submitting from time to time, and therefore the indictment departs from the words of the statute.

1819.
The KING
v.
PAGE.

Cur. adv. vult.

No judgment was given in this case, but on the 9th of July, the prisoner received a pardon. The majority of the Judges were of opinion, that the offence for which the prisoner was indicted did not constitute a felony within 5 Geo. 2. c. 30. s. 1.; but unanimously held, that by his lying in prison he had committed an act of bankruptcy.

MORROW v. SANDERS.

Monday,
June 28.

MR. Serjt. *Vaughan*, on a former day in this term, had obtained a rule *nisi*, that the plaintiff might be at liberty to inspect and take a copy of a deed of co-partnership made between him and the defendant, and signed by the former, on an affidavit of the plaintiff, which stated that the present action was brought for not taking him

If one part of a deed be executed by the plaintiff alone, but remain in the possession of the defendant's attorney, the Court will order him to give an inspection and copy of it to the plaintiff, and the affidavit for such inspection, need not set out the plaintiff's cause of action.

1819.
MORROW
v.
SAUNDERS.

into partnership pursuant to a certain deed of co-partnership, prepared by the defendant's attorney, and which was executed by the plaintiff, and was now, as the deponent verily believed, in the possession of the defendant, or his attorney, and that he is advised, that he cannot proceed in such action without a copy or inspection of such deed, and that he hath not now nor ever had the original deed, or any copy thereof, in his possession, and that he believes that no other deed or counterpart but the one above-mentioned was made or executed between him and the defendant.

Mr. Serjt. *Hullock* now shewed cause, and submitted, that this affidavit was insufficient, as it did not express the cause of action, and that the Court could draw no inference as to its nature. He also relied on affidavits of the defendant and his attorney, the one of which stated that he never executed any bond of co-partnership between him and the plaintiff, nor had he any such deed so executed in his possession; the other, that in *January* last, he prepared a deed of co-partnership between the plaintiff and defendant, which was then in his possession, and executed by the plaintiff alone, but that the defendant refused his sanction thereto, and has not executed the same. The learned Serjeant contended, that this application was not warranted by the cases which had been previously determined on this point, and relied on *Street v. Brown* (a). But,

Per Curiam,—Here there was only one instrument, and the Court therefore have a right to interfere; but if there were two copies, they would not. It is unne-

(a) 1 *Marsh.* 610.

cessary for the plaintiff to have disclosed the nature of the action in his affidavit; and it appears he is liable to the defendant's attorney for one half of the expences that have been incurred in preparing the deed.

1819.

MORROW
v.
SAUNDERS.

Rule absolute (a).

(a) See the case of *Cooke v. Tamwell*, ante, vol. i. 435, and the authorities there cited.

SHEPHERD, Demandant, BREWER, Tenant,
SHEPHERD, Vouchee.

Monday,
June 28.

MR. Serjt. *Frere* moved, that this recovery might be amended, or permitted to pass as of this term, on the ground of a clerical error having occurred in the surname of the demandant. It appeared, that in the warrant of attorney, and the subsequent instruments relative to the recovery, the name of the demandant was *Thomas Woolley*, whereas it ought to have been *John Shepherd*. The mistake was accounted for by an affidavit, which stated that the attorney had two recoveries to be passed at the same time, the one in the name of *Shepherd*, and the other of *Woolley*, and that he mistook the name of one demandant for the other.

If a wrong surname of the demandant be inserted by mistake in the warrant of attorney, and subsequent instruments, the Court will allow the recovery to pass, on the production of a new warrant of attorney rectifying such mistake, and on depositing the other instruments with the officer till that time.

As the recovery had not yet passed, although it was intended to pass as of this term, the Court ordered that it might, on the production of a new warrant of attorney, rectifying the mistake, and depositing the other instruments with the proper officer of the Court, until such mistake should be rectified.

Fiat.

1819.

Tuesday,
June 29.

WINTER v. WHITE.

Six partners entered into two bonds of submission to arbitration; in the one, three gave a joint and several bond to the other three, conditioned for the due performance of the award, and the three latter gave a similar bond to the three former. The arbitrator awarded that one of the three former should pay a certain sum to one of his co-obligors. In an action of debt on the award brought by the one against the other alone.—Held: that he might recover the sum awarded.

In the recital of the bonds,

the differences were stated to be depending between the above bounden three, and the above named three; in setting out the bond in the declaration, the differences were laid to be depending between the six partners collectively. This is no variance.

THIS was an action of debt on an award. The declaration stated, that before the time of making and executing the bonds or obligations, and making the submissions thereafter mentioned, the plaintiff, one *William Munton*, the defendant,—*Joseph Hollams*, *Thomas Knott*, and *Samuel Pointon*, had been concerned together in trade as ship-owners and coal-merchants, and that divers differences and disputes had arisen, and at the time of making and executing the bond, and making the submission thereafter mentioned were depending between the said plaintiff, defendant, and *Munton*, *Hollams*, *Knott*, and *Pointon*, with respect to such trade, and the accounts relating thereto, and that thereupon, and whilst such differences and disputes were depending, to wit, on the 7th November, 1815, the plaintiff, defendant, and *Munton*, by a certain bond, bearing date on that day, became jointly and severally bound to *Hollams*, *Knott*, and *Pointon*, in the penal sum of £2000; and that *Hollams*, *Knott*, and *Poulton*, by another bond bearing date the same day and year aforesaid, became jointly and severally bound to the plaintiff, defendant, and *Munton*, in the penal sum of £2000, with conditions under the several bonds respectively, whereby, after reciting that the plaintiff, defendant, *Munton*, *Hollams*, *Knott*, and *Pointon*, had been, some time ago, concerned together in trade, as ship-owners and coal-merchants; and that divers differences and disputes

had arisen, and were then depending between the plaintiff, defendant, *Munton, Hollams, Knott, and Pointon*, with respect to such trade, and the accounts relative thereto; and further reciting, that it had been agreed, by and between all those parties, that all accounts relative to the trade, and all differences and disputes between them, with respect to the same, should be referred to the award, &c. of *Benjamin Kidman* and *William Wood*, arbitrators, indifferently named and appointed, by and on the several parts and behalves, as well of the plaintiff, defendant, and *Munton*, as of *Hollams, Knott* and *Pointon*, to arbitrate, adjudge, and determine, of and concerning all such accounts, and all claims, differences, and disputes, with respect thereto; and that in case the arbitrators could not determine the same, then, that the same should be determined by a third person to be by them chosen as umpire, in such manner as thereafter was in that behalf mentioned and expressed; the bonds were respectively conditioned, amongst other things, in all things, well and truly to stand to, obey, abide, observe, perform, fulfil, and keep, the award to be made by the said *Benjamin Kidman* and *William Wood*, of and concerning the said trade, and all accounts, differences, and disputes, relative thereto; and of and concerning all actions, cause, and causes of action, suits, claims, damages, and demands whatsoever, then or at any time theretofore had, made, moved, brought, commenced, or depending, by or between the said parties, or any of them, or any other person or persons, claiming to be a creditor or creditors upon the matters thereinbefore agreed to be referred, so as such award should be made in writing, and ready to be delivered to such of the parties as should require the same, within one calendar month next ensuing the day of the date of the bonds. The declaration then stated two agreements also contained in these bonds, the one as to the payment of the costs of the

1819.
 WINTER
 2.
 WHITE.

1819.
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 WINTER  
 v.  
 WHITE.

award, the other as to the swearing and examination of the witnesses, and production of papers. It then averred, that *Benjamin Kidman* and *William Wood*, had taken on themselves the burden of the arbitration, and had, within the time for that purpose limited and appointed, to wit, on the 7th day of *December*, in the same year, duly made their award, of and concerning the matters in difference between the said parties referred as aforesaid, ready to be delivered to the parties, or such of them as should desire the same, and bearing date the same day and year last aforesaid, and had thereby awarded and ordered that the defendant should, on the 8th day of *January* then next, at a certain house in *Margate*, pay to the plaintiff the sum of £156. 12s. 6d. being the balance which they found to be due from the defendant to the plaintiff, on account of their partnership dealings, including therein, one-sixth part of the expence of the reference and award; and that after having allowed to the credit of the defendant, the sum of £67. 19s. 3d. the amount of his bill for work done for the partnership concern, together with interest upon the said sum of £156. 12s. 6d. from the date of their award;— Of which award the defendant afterwards, on, &c. in the year aforesaid, had notice. The count concluded with a breach for non-payment of the money awarded. To this was added a count for goods sold and delivered to the amount of £9. 12s. 6d. The defendant pleaded *nil debet*, and gave a notice of set-off for money due from the plaintiff to him.

At the trial of the cause before Mr. Justice Park, at London, at the Sittings in the last *Hilary Term*, it appeared that *Hollams*, *Knott*, and *Painton*, had given a joint and several bond to the plaintiff, defendant, and *Munton*, and that the three latter had also given their

1819.  
  
 WINTER  
 v.  
 WHITE.

joint and several bond to the three former, conditioned for submitting to arbitration divers differences and disputes which had arisen and were depending between them, with respect to their trade. The recital and condition of the bond, under which the arbitrators made the award, and which was the subject of the present action, was in the following terms: "Whereas the above bounden *Hollams, Knott, and Pointon*, and the above named plaintiff, defendant, and *Munton*, were some time ago concerned together in trade as ship-owners and coal-merchants, and whereas divers differences had arisen, and were then depending between the above bounden *Hollams, Knott and Pointon*, and the above named plaintiff, defendant, and *Munton*, with respect to such trade and the accounts relative thereto; and whereas it had been agreed, by and between the above bounden *Hollams, Knott, and Pointon*, and the above named plaintiff, defendant, and *Munton*, that all accounts relative to the said trade, and all differences between the said parties, with respect to the same, should be referred to the award and determination of *Benjamin Kidman* and *William Wood*, arbitrators, indifferently named and appointed, by and on the several parts and behalves, as well of the above bounden *Hollams, Knott, and Pointon*, as of the above named plaintiff, defendant, and *Munton*, to arbitrate, adjudge, and determine, of and concerning all such accounts, and all claims and differences relating thereto. Now therefore the condition of the above obligation was such, that if the above bounden *Hollams, Knott, and Pointon*, and each of them, their and each of their heirs, executors, and administrators, did and should, on his and their respective parts and behalves, in all things well and truly, stand to and keep the award to be made by the said *Benjamin Kidman* and *William Wood*, of and concerning the said trade and dealings, and all accounts and differences relative thereto, and of and concerning all ac-

1819.  
~  
WINTER  
v.  
WHITE.

tions, &c. (in the terms of the declaration), so as such award were made in writing, and ready to be delivered to such of the said parties as should require the same, within one calendar month next ensuing the date of the obligation, then the above obligation was to be void."—On the production of the award, it appeared that the arbitrators among other things, had awarded in the terms, as stated in the declaration, and had further awarded, that if at any time thereafter, any money should be recovered and received, on account of a sum stated to be the amount of debts due to the partnership concern, and which were then considered as bad and doubtful, the same should be divided equally between the whole of the six partners. It was also proved, that there were never any disputes between the plaintiff, defendant, and *Munton*, collectively, and *Hollams*, *Knott*, and *Pointon*, collectively, but that the differences had existed between the six parties individually, on account of a partnership concern which they had carried on together, and that the arbitrators had awarded accordingly. On the production of the bond, and the award, it was objected for the defendant, first, that there was a variance between the bond produced in evidence, and that set out in the declaration, for it appeared by the latter that differences had arisen between the whole of the six partners. Whereas by the bond, such differences had only existed between the three obligees, and the three obligors; and that it was apparent on the face of the bond, what the effect was to be, viz. to refer differences between the plaintiff, defendant, and *Munton*, of the one part, and *Hollams*, *Knott*, and *Pointon*, of the other. Secondly, that this action could not be sustained by the plaintiff against the defendant alone, as they were not bound the one to the other, in either of those bonds, but co-obligors with *Munton* in one of the bonds, and joint-obligees in the other. The Jury found

a verdict for the plaintiff, but the learned Judge reserved the above points for the consideration of the Court.

1819.  
WINTER  
v.  
WHITE.

Mr. Serjt. *Bosanquet*, in the course of the last *Hilary* term, had accordingly obtained a rule *Nisi*, that this verdict might be set aside, and instead thereof, a nonsuit entered, or that the judgment might be arrested. He observed that the bonds were the foundation of the present action, and that there had been no parol submission, or any rule of Court by which the arbitrators had been directed to make their award; and that as such bonds had been given by the plaintiff, defendant, and *Munton*, who continued in partnership, to *Hollams*, *Knott*, and *Pointon*, with respect to differences between the former as obligors, and the latter as obligees jointly, the award was bad, as it was made between the parties individually. That no action could have been maintained by the plaintiff against the defendant alone, on those bonds, as the submission was between three and three collectively, and not between the six individually.

This case was twice argued, first in the last *Hilary* term, by Mr. Serjt. *Lens* for the plaintiff, and Mr. Serjt. *Bosanquet*, and Mr. Serjt. *Taddy* for the defendant. The Court, in *Easter* term, directed a second argument, which accordingly took place in this term by Mr. Serjt. *Taddy* for the defendant, and Mr. Serjt. *Lens* for the plaintiff.

For the plaintiff;—It was submitted, that there was no variance between the bond produced at the trial, and that set forth in the declaration, and that a right of action subsisted between the plaintiff and defendant individually, on the following grounds: First, it must be collected from the bonds themselves, that the parties intended to refer the whole of the partnership accounts to arbitration, and all matters in difference between all or any



1819.  
WINTER  
v.  
WHITE.

of them, and did not intend to make it a reference by three constituting one party to the other three collectively. As to the allegation in the declaration, that divers disputes were depending between the six, it cannot be a variance, as the recital in the bond begins in the same manner. By using the words "above bounden" and "above named" in the latter, the parties are not divided into two different bodies, consisting of three each, for they all entered into two several bonds; the submission was the submission of all, the disputes were general between all the parties, and the matters were referred to the arbitrator, relative to them all, during the time the partnership was in existence. This therefore cannot be considered a dealing between three partners of the one part, and three of the other; for if so, it would be contrary to the effect of the submission, as the arbitrator would then be confined to award on disputes existing between the three and three collectively, when, in fact, each of the six had a separate and individual interest. If the first three could be considered as having had an individual interest, the proceedings would be absurd, *ab initio*. No partnership existed as between three and three, neither were there any accounts to be settled, nor disputes between them as such. The objection therefore as to variance, is merely formal and technical. Secondly, as to whether this action is maintainable, it is necessary first to ascertain whether the submission be good in itself, for this purpose it is necessary to consider the condition of the bond by which the differences between the parties were submitted to arbitration; it is, that if the above bounden *Hollams*, *Knott*, and *Pointon*, and each of them shall, on his and their respective parts and behalves, keep the award to be made by the arbitrators concerning the trade and dealings, and all accounts, differences, and disputes, relative thereto, by or between the said parties, or any of them, or any other person claiming to be a cre-

ditor upon the said parties or any of them, with respect to all of the matters agreed to be referred. It is quite clear that the trade, dealings, and accounts, as well as the disputes which existed at the time the bonds were entered into, related to all the six parties, and this is proved by the arbitrators being empowered to award between all those parties or any of them; if the disputes had existed between the two parties only, the word "either" would have been proper, but the word "any," is disjunctive as to two parties only, and makes each of them liable individually. It is apparent on the face of the declaration, that the arbitrators might consider it in this light, for although there were only two bonds, in the one of which the parties who continued in partnership were obligees, and the other obligors, still in effect it was a submission by all, though each did not enter into a separate bond. By the declaration, as well as the bond, the arbitrators seem to have been empowered to take all the accounts and differences between them into consideration, and they have awarded as between the plaintiff and defendant, that the latter should pay a balance due from him to the former, on account of their partnership dealings. This is sufficiently described, and they ought not to have found what was due from *Hollams, Knott, and Pointon*, to the plaintiff, defendant, and *Munton* jointly, as all differences which existed between all the parties separately and individually, were submitted to them. It is true there is no case which has been decided where one of two obligors can sue the other on a bond entered into by them both, but the plaintiff here does not sue on the bond, but on a distinct and different cause of action, namely, the award, and the bonds are merely evidence of a submission to such award. If the submission to arbitration be bad, the party has his election to bring his action on the award: although an action could not be brought on the bonds themselves, still


1819.  
WINTER  
v.  
WHITE.

1819.  
WINTER  
v.  
WHITE.

the parties were bound to abide by the award when made, and the plaintiff might therefore bring his action on the award. If the submission had been by parol, it would have been sufficient for this purpose; the arbitrators were empowered to award as to all the parties, and though from the terms of the bond, it may be difficult to ascertain their intention, yet, the arbitrators having made their award, which they were empowered to do by the terms of the submission, this action is maintainable against the defendant to enforce the award; and enough appears in the inducement of the declaration, to shew that all the parties not only acquiesced, but authorized the arbitrators to make an award between each of them, as relative to their individual concerns.

For the defendant;—It was insisted, that the sole question depended on the legal construction of the bonds by which the parties had submitted disputes subsisting between them, to arbitration, and which were under seal, and whether the bond, which was the subject of the present action, was truly set forth in the declaration; if not, that a nonsuit must consequently be entered. The submission can only be collected from the terms of the bond. In the declaration, it is stated, that differences existed between all six of the parties, but the bond expresses that such differences existed between three and three. No difference in fact existed between the plaintiff and defendant alone; and whether the bond recited that matters in difference existed between them individually, still the defendant is not bound to the plaintiff in either of the bonds, for in one of them they are co-obligees, and in the other co-obligors; they are either therefore joint or several co-obligees or joint or several co-obligors. It is only necessary to attend to the construction of the bonds themselves. Nothing appears on the face of them to shew that it was the intention of the parties to refer disputes

between the plaintiff and defendant individually, for although the conditions might lessen the effect of the obligations between the parties, still it could not increase such obligations so as to bind the defendant to the plaintiff alone. The arbitrators are appointed to settle disputes between three, who are styled as "above bounden" by a former bond in the submission, and three who are styled "above named" in a bond of the same date, conditioned for payment in a penal sum of money. It is therefore clear, that disputes had arisen between the above *bounden* three parties, and the above *named* three parties, but the declaration omits these terms altogether, and merely states that differences had arisen between the six. And it is also there stated, as being but one submission, whereas, there are in fact two, each bond having an obligation subscribed to it. It has been said, that the word "any," must have reference to more than two parties, but the obligations are between three continuing and three outgoing partners only, and the conditions have reference to the obligations alone. At all events, the plaintiff cannot maintain an action on either of those bonds, neither can he bring an action on the award, unless the agreement or submission to such award was good and perfect. The submission in this case being by bond, no parol submission can now be gone into, but there was no contract between the plaintiff and defendant, how therefore can debt be maintainable? It is true that an action may be brought, either on a submission or an award, but in the latter, the submission must be stated as an inducement, founded on a contract subsisting between the parties. Whether the plaintiff, defendant, and *Munton*, might have brought a joint action against one of the other three separately, is not now to be considered, but the plaintiff and defendant are either joint obligors or obligees, in the bonds, neither of whom can sue the other, as they are equally bound in the same instrument. If therefore an action could not be maintained on the bond,

1819.  
  
 WINTER  
 v.  
 WHITE.

1819.  
WINTER  
v.  
WHITE.

neither can it on the award, for the award is founded on the submission which was made by the bonds alone. If this action were maintainable, so might *assumpsit*; because, if the submission were not made on the bonds themselves, the latter would be equally good; the conditions of the bonds only constitute one contract between the whole of the parties bound, and therefore the only possible action that could have been brought, would have been by the three obligees, against the three obligors, collectively; for the condition of the bond on which this action is founded, has not constituted a contract between the plaintiff and defendant alone. In order to sustain debt on an award, there are two principal ingredients necessary in its support, first the submission, and secondly the award; and the extent of the arbitrator's power, is to be collected from the submission alone. Here the submission was made by two mutual bonds between two parties of three each, standing in the situation of co-obligors in the one, and co-obligees in the other. The contract therefore, in both, existed between parties of three and three, and not between either of the partners individually. Before this action could have been maintainable, the submission must have been made by a valid contract, which could not be the case here, as one obligor in a bond cannot bring an action against a co-obligor. In equity, the condition might be considered in the nature of an agreement between the two obligors, namely, that if one of them reimburse, the other shall be considered merely as a surety, but that construction arises not on the bond, but on the subsequent payment. The condition is only the defeazance of the bond, and on its performance, does away with the penalty therein contained. The bond was given to three obligors, who can alone take advantage of it; if the condition had not been performed, the penal part could not have been enforced. It may be contended, that

this action is not brought on the bond, but on the award itself; but even the latter cannot be supported, as the submission was insufficient in itself, and the plaintiff has not set out the whole of the condition of the bond in his declaration. There is no case analogous to the present in principle, as to whether the submission be sufficient or not; this is in substance, an action on the bond, and the only point is, whether one of two obligors can sue the other on the bond in which they are both parties? Though the action is in fact brought on the award, if the submission be by bond, it must be controlled by it, and the submission must be stated. The submission therefore is founded on the bond by which the arbitrators are controlled to determine differences which existed between three of the parties collectively on the one hand, and three on the other.

In reply;—It was observed, that though the submission might be imperfect, still the error was mutual, and that enough appeared on the face of the bond, to shew that the present action might be maintained. This is not in substance the same as an action brought by one obligor against another on the same bond. The equitable construction of the condition is not applicable to the present, for there, where one party has paid more than his share, the other is liable for contribution, but that is not founded on the bond, but on other extraneous matters. If the bond be imperfect in terms, it is sufficient to shew the intention of the parties as to what they meant to refer. It appears by the award, that all differences that existed between them, were referred to the arbitrators. They were all partners, and accounts remained unsettled between each of them, and the arbitrators were empowered to settle the differences which existed between each, individually. By the bond it appears, that all the partners submitted to

1819.  
  
 WINTER  
 v.  
 WHITE.

1819.  
WINTER  
v.  
WHITE.

a reference, and though it is made between three and three, still the intention of the parties is intimated throughout. The parties might have declared their intention independently of the penalty on the bond, and they might have signed and not sealed it. The submission therefore is the same as if the bond contained no penalty, as the object of the parties is set forth in the submission. The declaration recites, that six persons were in trade together; this therefore was not a partnership of three on the one hand, and three on the other, but of six individually, who submitted to have all their disputes and differences settled by two arbitrators. It therefore appears clear, on the face of the declaration, that the parties intended to leave their disputes individually to the determination of the arbitrators, whose award therefore is not founded in mistake. The bonds are wholly unnecessary, and if the intention of the parties can be ascertained, an action may be brought to enforce the award, and the submission being averred in the declaration, the award made by the arbitrators is not only correct, but the present action founded on it, is well brought.

*Cur. adv. vult.*

The Court being divided in opinion, on this day delivered their judgments *seriatim* as follows:—

Mr. Justice RICHARDSON. This is an action of debt on an award (Here the learned Judge read the declaration). The defendant pleaded *nil debet*. At the trial, the bonds containing the submission to arbitration, as well as the award itself, were produced in evidence, and the Jury found a general verdict for the plaintiff. The defendant has since obtained leave that this verdict might be set aside, and a nonsuit entered, or that the judgment might

be attested. The ground on which the nonsuit was moved for was, that there was a variance between the bond as produced at the trial, and that set forth in the declaration; and the motion in arrest of judgment was founded on the objection, that no contract existed between the plaintiff and defendant, so as to enable the one to maintain an action against the other individually. The first point as to the variance is a mere technical objection; if the bond be not truly stated in the declaration, the defendant is entitled to the benefit he seeks to derive from it: but I shall confine myself to that part of the motion which goes in arrest of judgment. The question on which is, whether any cause of action exists between the plaintiff and defendant, or whether any contract between them is disclosed, or appears on the record, to entitle the former to recover, and I am of opinion there does not. There are authorities to shew, that where an award for the payment of money is made under bonds of submission, the party to whom the money is to be paid, may either bring an action upon the bond for not performing the award, or have an action of debt for the money, and declare upon the award itself. *Anonymous (a)*, *Jenkinson v. Allison (b)*, *Dilley v. Polhill (c)*. I cannot discover the principle on which those cases were decided. Where an award is concluded, the parties referring must be considered as bound to perform the directions of the arbitrator. Before the statute 8 & 9 *Will. 3. c. 11*, judgment was signed for the penalty, but such judgment can now only stand as a security for the damages sustained, and for which alone an execution can issue. That statute is highly remedial, as defendants may thereby be relieved against an unconscientious demand of the whole penalty,

1819.

WINTER  
v.  
WHITE.

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(a) *Freem. Rep.* 410.—(b) *Id.* 415.—(c) 2 *Str.* 923.



1819.  
~~~~~  
WINTER
v.
WHITE.

in cases where trifling damages only have accrued. There is no case where it has been held, that an action will lie on an award different from that on which the submission is founded, as where the submission is by bond, if an action of debt is maintainable on the award, so such action can be brought on the bond of submission on which such award is founded; as in the case of *Freeman*, which was an action of debt on a bond to perform an award, and the plaintiff having ill assigned a breach in his replication, moved to discontinue, the Court refused it, as the award was for the payment of money, and they said the plaintiff might have his action of debt on the award. So in *Jenkinson v. Allison*, which was a similar action, the replication was held ill, as it did not aver that the award was ready to be delivered to the parties, according to the terms of the submission, and the plaintiff prayed leave to discontinue; but Mr. Justice Thirlden said, he had known it denied where the award was for the payment of money only, for that there the party might have an action of debt upon the award. An award, in its nature, is the determination of a third person, who is to judge of disputes existing between two others or more, who submit to the judgment of such third person giving him power to decide, and the duty incumbent on the parties to obey his decision, arises from the contract of submission; if therefore an action be brought on the award, it is necessary to look to the contract of submission on which such award is founded, and not to the award alone. The submission is the basis of the action, and must be examined for the purpose of seeing by and with whom the contract is made, as well as what the contract itself really is. Here the only submission was by two bonds, by the one of which the plaintiff, defendant, and one *Munton*, became jointly and severally bound to three other persons, and by the other, those three persons became jointly and severally bound to the plaintiff, defendant,

and *Munton*. It seems to me therefore, quite clear, that an action on either of those bonds cannot be maintained by the plaintiff against the defendant alone: it is unnecessary to consider whether the action might be maintainable if differently brought, but here the plaintiff and defendant are either joint and several obligees or obligors; unless therefore a different contract can be inferred from the conditions from that which is expressed in the obligatory part of the bonds, it cannot be said the plaintiff and defendant are contracting parties with each other. The conditions cannot introduce any new and different contract, for they are not independent of a contract, but merely operate as a defeazance to destroy the obligatory parts of the bonds, and not to create a new duty. The terms of the conditions are not evidence of a contract, but amount only to a defeazance, namely, that in case of the performance of certain events therein named, the bonds should be void, otherwise that they should remain in full force. It has never been held, that the condition furnishes evidence of any other contract than that contained in the obligatory part of the bond itself. In bonds of reference, it is generally superadded, that the submission may be made a rule of Court. In construing submissions, they must receive a large construction. In *Athelstone v. Moone* (a), it was determined, that a submission of all matters in difference, imports all matters which either party had jointly or severally against each other; and it appears by the marginal note to the case of *Carter v. Carter* (b), that if A. and B. on one part, and C. on the other, submit to arbitration, the arbitrator may make an award, not only of matters in difference between A. and B. jointly, or A. and B. separately, and C., but also of matters between A.

1819.
 WINTER
 v.
 WHITE.

(a) *Com. Rep.* 547.—(b) 1 *Vern.* 259.

1819.
WINTER
v.
WHITE.

and B.; but that note is not warranted by the case itself, for there the submission was between two executors of the one part, and the testator's widow of the other. But the only case which bears a near resemblance to the present, is in *Brooke's Abridgement* (a), where, after citing the Year Book (b), in which it was held by three Justices, in the Exchequer Chamber, that if J. N. and three others, put in award of W. P. all actions and demands between them, the arbitrator has authority to make award of all joint matters between them, and all several matters also. This is similar to the case of *Athelstone v. Moone*, but *Brooke*, in his *Abridgement*, adds, "But it seems clear, that the arbitrator had not authority to determine or arbitrate matters between the three, for they make one party against the fourth, but he may determine between any of the three and the fourth." This appears to me to be founded in reason and principle, as otherwise a different effect might be given to the submission. Here, the only submission was by mutual bonds between two parties, consisting of three each. They only can sue or be sued on the award conjointly, and I therefore think that the judgment ought to be arrested.

Mr. Justice BURROUGH.—It is unnecessary to consider the point which has been raised with respect to the variance, and the only remaining question goes in arrest of judgment, and in fact is, whether the arbitrators have rightly decided the matters submitted to them, and if so, whether the present action, which is founded on their award, be maintainable or not. The objection raised by the defendant is, that the plaintiff cannot recover against him, as they are both joint obligors in one of the bonds, and

(a) *Tit. Arbitrement*, pl. 44.—(b) 2 *Rich.* 3. 18 (B).

joint obligees in the other. It has been contended, that the matter on which the arbitrators have decided, as between the plaintiff and defendant, was not referred to them. In the first place it is necessary to consider, who are the parties to the submission? They consist of the plaintiff, defendant, and four others. And secondly, what is the form of the submission? It is by two several bonds, in the one of which the plaintiff, defendant, and *Munton*, became jointly and severally bound to *Hollams*, *Knott*, and *Pointon*, in the penal sum of 2000*l.*, and on the part of the three latter, they by the other bond became jointly and severally bound to the plaintiff, defendant, and *Munton*, in the like sum. By those bonds therefore, all six of the parties became jointly and severally bound. Thirdly, the matters submitted to the arbitrators are to be found in the recitals and conditions of the bonds. The recitals are, that these six persons were some time ago concerned together in trade and dealings as ship owners and coal merchants, and that divers differences and disputes having arisen, and being then depending between them with respect to such trade and the accounts relative thereto, it had been agreed by and between them all, that all accounts relative to the said trade, and all differences and disputes between the said parties, with respect to the same, should be referred to two arbitrators therein named and appointed on the several part and behalf, as well of *Hollams*, *Knott*, and *Pointon*, as of the plaintiff, defendant, and *Munton*, to arbitrate and determine of and concerning all such accounts, and all claims, differences, and disputes, with respect thereto. By those recitals, not only all the accounts of the six partners relative to their trade, but all disputes between them with respect thereof were mutually referred. The conditions of these bonds are united with, and adopt the recitals. The conditions are, that if, as well the plaintiff, defendant, and

1819.
WINTER
v.
WHITE.

1819.
 ~~~~~  
 WINTER  
 v.  
 WHITE.

*Munton*, as *Hollams*, *Knott*, and *Pointon*, and each of them, their and each of their heirs, &c. and every of them do, on his and their respective parts, obey and keep the award to be made by the arbitrators, of and concerning the said trade and dealings, and all accounts, differences, and disputes relative thereto, and of all actions, &c. then or at any time theretofore had or depending by or between the said parties or any of them, with respect to all or any of the matters thereinbefore agreed to be referred, then the obligations were to be void. These two bonds, with their conditions, form in effect only one agreement of submission. To avoid expence, the reference was effectuated by two bonds only, instead of six. Each of the bonds were joint and several, and properly so, because the matters referred were joint and several. The trade and dealings between the parties were joint, but when their accounts were to be wound up by the arbitrators, they became joint and several. Each of the parties had a several interest in the subject-matter of the reference; and it further appears on the face of the declaration, that each of them had agreed to such reference. From the nature of a partnership, the accounts must be between all the partners, and every of them, and therefore these six parties agreed that the matters to be decided, were accounts and disputes between them or any of them. *Fourthly*, it is to be considered whether the award made by the arbitrators was authorised by those bonds? They have awarded that the defendant, one of the obligors in one of the bonds, shall pay to the plaintiff, who is a co-obligor in the same bond, a certain sum of money, which they found to be due from the defendant to the plaintiff, on account of their partnership dealings, including therein one-sixth part of the expences of the reference and award. Each of the parties to the bonds had agreed to refer all the partnership accounts to the

determination of the arbitrators. They could not have made their award, without having taken into their consideration the account of each of the partners, as well as the interest of each and every of them therein. If, on the whole account, there had been £600 to be divided between all six, and the three obligees in the bond in which the plaintiff was one of the obligors, had received £100 each, and *Munton*, the third co-obligor, had also received £100, the defendant £200, and the plaintiff nothing, can any rule of law, or in equity, prevent the arbitrators from awarding that the defendant, having received £200, should pay the plaintiff one moiety: when the former had received £100 more than his share, and the plaintiff, who was equally entitled to his share of £100, had received nothing? For these reasons, I think the award was well made. The case of *Carter v. Carter (a)*, is extremely applicable to this case, although my Brother *Richardson* has drawn a distinction between them. [Here the learned Judge read the whole of that case.] There, two executors of a testator of the one part, and his widow of the other, submitted themselves to an award, and entered into a recognizance for its performance; the arbitrator, after reciting that the testator had acknowledged a judgment to one of the executors, and that the widow (the terre-tenant) was, by reason thereof, disturbed in her jointure, awarded that the said executor should acknowledge satisfaction upon the judgment; but there, the executor who made the submission, had the whole power of the judgment in him, and though the widow was only disturbed in her possession, yet the parties to the judgment were herself and the two executors; the reference there was joint, whilst in this case it is joint *and several*. There too, the objection was, that the reference being between two persons jointly

1819.  
  
 WINTER  
 v.  
 WHITE.

---

(a) 1 Vern. 259.

1819.  
WINTER  
v.  
WHITE.

of the one part, and one of the other, the arbitrator had no authority to award on the matter which immediately was between these two, but because the person on the other part was disturbed by it, and they were all parties, the award was held good: Here, all six are severally parties to the reference, and are severally interested in the subject-matter of it; they all severally agreed to abide the award of the arbitrators, who were authorised to settle all the accounts and differences relating to the partnership between them, or any of them. If the award be well made, what objection can there be to the present action, which is of debt on the award, for a specific sum awarded to be paid by the defendant to the plaintiff? The action is not founded on a contract, for the sum, when it has been awarded, becomes in the nature of a judgment or decree, and has therefore nothing to do with a promise on which the action on contract is founded. Debt lies on the award, because the subject-matter of reference by the award, *transit in rem judicatam*; the award therefore creates the duty, and the parties are not driven to an action on the bonds, under which the arbitrators were empowered to act. It is not essential to an action on an award, where the submission is by bond, that the plaintiff should be enabled to recover the same sum by an action on the bond, for here the bonds and their conditions are only to be looked to, in order to see whether the matter awarded be authorised by an agreement to submit. It does not appear to be necessary that all the parties on either of those bonds, should be joined if an action were brought on the award alone, for the only thing necessary to be stated in the declaration is, whether the matters awarded be within the terms of the submission, and I think it is quite clear that in this case the sum awarded is authorised by the bonds containing the terms to submit. Each of the six has agreed to a reference of the accounts relative to the partnership, and by the con-

ditions of the two bonds, each and every of them are to perform the award generally, respecting their trade, and accounts, and all differences, and disputes relative thereto, between the said parties, or *any of them*; and in strictness, if it were necessary so to contend, which I think it is not, I conceive that an action might be brought on the bond, in which the plaintiff is obligor, by the obligees in that bond, against the defendant for not paying the money awarded, as the three obligees might be considered as trustees, and might have sustained their action, because one of the obligors would not pay a sum awarded to be paid to one of his co-obligors. As, therefore, by the conditions of the bonds, each of the parties are bound to obey the award, and as the award itself is well made, I am of opinion that the present action is maintainable, and that the rule for arresting the judgment must be discharged.

1819.  
  
 WINTER  
 v.  
 WHITE.

Mr. Justice PARK.—It has been truly observed, that it is painful for the Court to give judgment upon strict legal and technical objections, against the real justice of the case, but it must be highly satisfactory when they can give effect, in conformity to what justice requires, so as to violate no rule of law. This case has been moved on two grounds, first, that a nonsuit might be entered; and secondly, in arrest of judgment. As to the first, the objection is founded upon the ground of a variance between the bond proved at the trial, and that stated on the face of the declaration; for it is said, that on the face of the declaration, in reciting the condition, it is stated as if divers differences and disputes had existed between all the six partners, whereas, in the condition of the bond itself, it is stated as if the disputes had arisen between the three obligors in the one bond, and the three obligees in the other, and not between the six; but it must be observed that the present action is not brought on the bond, the



1819.  
WINTER  
v.  
WHITE.

stating it, therefore, is merely matter of inducement, which is only necessary for the purpose of shewing that the arbitrators had jurisdiction; it seems to me that in this case it is stated with sufficient precision, for it is true that all six agreed to refer, and although three were bound to three, and were therefore obliged to be described in the bond as the *above bounden* and the *above named*, yet, as the whole six agreed that all the accounts and differences between them or *any of them* should be referred, it appears to me to be unnecessary to shew how the parties were bound to each other; that this therefore is no variance, and that on this ground alone, the rule, as to the first point, must be discharged:—The main question is on the arrest of judgment, because it has been said that the award is not justified by the submission. I admit that an action could not have been brought on the bond by the present plaintiff against the defendant, because both are obligors, and one obligor cannot sue another; but this is an action on the award, which I also admit must be justified by the submission, and which, in this case, I think it is. The arbitrators have taken the partnership account into their consideration, in the course of which, they have found that the defendant owed the plaintiff a certain sum of money, and that the plaintiff owed the defendant another sum, the one of which they deducted from the other, and accordingly awarded the balance to the plaintiff, to whom the larger sum was due. This appears to me to be most equitable and just; it is difficult to point out any other mode by which a partnership account could be taken into consideration; such account generally consists either of monies due from or to the partnership to and by the world at large, or of sums of money advanced and received, more than each individual share among the partners themselves. Here, the declaration, and the conditions of the bond as recited in it, clearly shew the intent of the parties as to

what was to be transferred. It is recited in the declaration,—“That whereas the six parties had been concerned together in trade, as ship-owners and coal merchants, and that divers differences and disputes had arisen, and were then depending between them with respect to such trade and dealings, and the accounts relating thereto; and that thereupon, and whilst such differences and disputes were depending, they entered into bonds, the plaintiff, defendant, and *Munton*, to *Hollams*, *Knott*, and *Pointon*, binding themselves jointly and severally, to abide the award, and the three latter, by another bond of the same date, being jointly and severally bound to the three former, for the performance of the same.” The condition of the bond on which the present action is brought is then recited, namely, “That those six persons had been, some time ago, concerned together in trade, as ship-owners, and that divers differences and disputes had arisen and were then depending between the six with respect to such trade and the accounts *relative thereto*; and further reciting that it had been agreed between all the six, that all accounts relative to the said trade, and all differences and disputes between the parties with respect to the same, should be referred;” then the bond is farther conditioned to obey the award to be made by the arbitrators of and concerning the said trade and dealings, and all accounts, differences, and disputes *relative thereto*, and of and concerning all actions, &c. then depending by or between the said parties *or any of them*. It therefore appears to me that no words can be conceived stronger than those, to shew the clear intent of the parties to be to refer every thing relative to their former trade. But it has been contended for the defendant, that when he used the term “all accounts” he only meant some accounts, and not all, those however, could not be prospective, but must have relation to time past, for the conditions in both the bonds expressly speak of time past only, as it is

1819.  
  
 WINTER  
 v.  
 WHITE.

1840.  
 WINTER  
 v.  
 WHITE.

noted that the parties had been in partnership, and that differences had arisen with respect to their accounts. It has been also said that it was only intended the arbitrators should take the joint account with all the world, although that is no where distinctly referred, and the accounts which might subsist between the three on the one side, and the three on the other; but how could there be a joint account between these two parties only? To this, no satisfactory answer can be given. If this reference was only to take the accounts between the three and the three, when there can be no such accounts, and if the public accounts of the partners, with their customers, debtors, or creditors, are not in question, the whole of this proceeding is nugatory and void, but it is necessary for the Court to see if they cannot discover a sensible meaning for the parties, consistently with the language used, and not contravening any rule of law. In all cases of arbitration, the intentment is to put an end to all disputes and controversies that may be in existence between the parties, and therefore there is to be a reasonable construction. Here, the only controversies must have been the accounts relative to the trade and dealings *inter-se*, which alone were referred to the arbitrators. Nothing is more common than that one partner draws out a larger sum for his family than another; accounts of this description must have been the object of the present reference. How, therefore, could it be intended to confine such accounts to between three and three, when the words are "between the said parties *or any of them*," which must be taken to mean the parties or any of them individually; if it had been intended only conjunctively, it must have been differently expressed. No authorities on this point have been referred to at the bar, and there is certainly a great paucity of opinions on it. Indeed there is no precise authority, because, before this case, probably there never was so bungling a piece of machinery introduced with a view to settle differences between the

parties, for I cannot suppose that any professional man meditated the great evil that this attempt to arrest the judgment is calculated to produce, and more especially so, if the attorney applying for this rule prepared the instruments himself. But the researches of the Court have proved, that although authorities are wanting as to the mode, that still they are not entirely so as to the principle by which this case must be governed, and although those are not *ad idem* in circumstances, yet they are applicable to shew that the Court may lean to the justice of this particular case. In *Butler v. Wigge* (a), the principle is well expressed: That was an action of debt on an arbitration bond, and the Court held the condition to be good, although it was not so properly expressed as it should have been, and they said "any words by which the *intention of the parties* could appear were sufficient to make a condition of an obligation." The construction now contended for by the plaintiff does not appear to me to be at all stronger than that which has been put in the following cases. The oldest is to be found in the Year Books (b), and is as follows:—"It was assented by *Hussey, Fairfax, and Catesby*, Justices, in the Exchequer Chamber (c), that if three and one, submit themselves to the award of one, of all debts and demands between them, who hath power by this to make an award of all matters which all the three have against the fourth, or any matter which any one of the three hath against the fourth, or any matter which any of the three hath against the other, if he award that one of the three shall give something to the fourth, and that the other two shall be quit; and where he

1819.

WINTER  
v.  
WHITE.

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(a) 1 *Wms. Saunders*, 65.—(b) 2 *Rich.* 3. 18. fol. B.—

(c) By an error in the first line, the figures, as printed, appear to be 31, but evidently they were intended to have been 3 & 1.

1810.  
 WINTER  
 v.  
 WHITE.

finds that the fourth owes to one of the three 20s. which he awards to be paid to him, and that he owes nothing to the other two, and doth therefore award that he shall be quit against them, this is a good award." Mr. Justice *Haughton*, in the case of *Berry v. Perry* (a), quotes this case in the above terms, and says it is good, and that "If an award be made for any of the three, it is sufficient, for that being in case of an arbitrament which is by intendment of law to make peace, and to put a perfect end to matters of controversies, therefore, in maintenance of such awards, a reasonable construction is to be made of them." Except the words "or any matter which any of the three hath against the other" which may admit of doubt, and which, if they were supposed to go the length of this case, would be a mere *obiter dictum*. The principle, and not the case itself, is applicable to the present. In *Rolle's Abridgment* (b), the principle is said to be, "that if *A.* and *B.* of the one part, and *C.* of the other part, submit themselves to the award of *I. S.* of all matters between them, *I. S.* hath power to make an award of any matter between *A.* solely and *C.*, though *B.* have nothing to do with it, for the submission shall be taken distributively." And it is there stated it was so adjudged on demurrer between *Arnold* and *Pole* (c). On that case, it may be reasonably shewn that the matters referred were only those between *A.* and *B.* jointly with *C.*, and not those which *A.* had in his own right with *C.*, and yet the Court went from the words used, and held it to be an authority for a distributive award. The same point has been determined in *Baspole's case* (d), and has been since supported and put out of all doubt by the case of *Athelstone v. Moon* and *Willes* (e), where, on a motion for an attachment for

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(a) 3 *Bulst.* 65.—(b) 1 *Rolle*, 246, pl. 5.—(c) *Mich.* 9 *Cur.* 1. *K. B.*—(d) 8 *Rep.* 98.—(e) *Com. Rep.* 547.

not performing an award which had been made pursuant to a rule of Court, it was objected that the award was void; for the submission was of all matters between the parties (without saying between them or "either of them"), so as the award be made of the premises by such a day. But the award was that the defendant *Willes* should pay a sum of money due by him to the plaintiff. As, therefore, the submission was to be understood of joint demands which the plaintiff had against the defendants, this award of a several debt from one of them only, was contended to be within the submission, but it was not allowed, for a submission of several persons, of all matters in difference between them, imports a submission of all matters that either had against the other jointly or severally, and it was there said that it had been so held (a). The object of the parties here was fully expressed in the condition of the bonds, which was to settle all the accounts between the six persons or any of them. To the above cases may be added that of *Carter v. Carter* (b), which has been fully gone into by my Brother *Burrough*, and which goes to shew, that as the object of an award is to make peace, and to put an end to litigation, the submission is to bear a reasonable construction. The case itself does not go wholly to this point, but if the marginal note be taken into consideration, namely, that such an award as was there made, was not only to decide all matters in difference between *A.* and *B.* jointly or separately with *C.*, but also all matters between *A.* and *B.*, it would decide the present question, but I doubt whether this note be warranted by the case itself. However, it shews the sense, if this note were *Vernon's*, who was a very eminent man at that time (and whom Lord *Kenyon* stated to be one of the ablest men in the pro-

1819.  
  
 WINTER  
 v.  
 WHITE.

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(a) See 1 *Rolle*, 256, pl. 1. and in *Baspole's case*, 8 *Rep.* 98.—(b) 1 *Vern.* 259.

1819.  
~  
WINTER  
v.  
WHITE.

session, although, he observed, that his notes were sometimes loose), yet as his reports were edited by Mr. *Peere Williams* and Mr. *Melmoth*, they might have probably been the authors of the marginal notes. But still I think that case goes to the full length of this. On the whole, therefore, considering that the three persons here have no subject of dispute with the three, and that the parties meant to submit their disputes individually, and thinking that construction may fairly be made from the condition of the bonds themselves, I am of opinion that the award sufficiently pursued the submission, and consequently that the judgment in this case cannot be arrested.

Lord Chief Justice DALLAS.—This case has been so fully gone into by my two Learned Brothers who have just preceded me, that I shall content myself by saying I fully agree with them, and that I consider this submission as a submission of all matters in dispute between the six parties individually, as well as to refer all their partnership accounts to the arbitrators generally; I therefore think their award has been well made, and has properly carried into effect the object of that submission, and that the plaintiff therefore is entitled to judgment.

Rule discharged.

## NIND v. MARSHALL.

1819.

Tuesday,  
June 29.

THIS was an action of covenant for quiet enjoyment: The declaration stated, that by a certain indenture of the 4th July, 1817, made between the defendant of the one part, and the plaintiff of the other part, after reciting that by indenture of lease bearing date the 9th of December, 1815, and made between *John Parker* of the one part, and the defendant of the other part, *Parker*, for the considerations therein mentioned, demised unto the defendant, his executors, administrators, and assigns, all that messuage, tenement, or dwelling-house and shop, with the garden thereunto adjoining, situate in the parish of *Enfield*, in the county of *Middlesex*: To hold the same to the defendant, his executors, administrators, and assigns, from the 25th of December, 1819, for the term of fourteen years thenceforth next following, subject to the yearly payment of £12 rent, and performance of covenants therein contained; and also reciting, that the plaintiff had agreed with the defendant for the absolute purchase of the said messuage and premises demised by the said lease, of all the defendant's estate, term, and interest therein, for the sum of £20. It was witnessed that the defendant bargained, sold, and assigned to the plaintiff the said messuage and premises mentioned and comprised in the before in-part-recited indenture of lease, and thereby demised or mentioned, or intended so to be, together with the said in-part-recited indenture of lease, and all benefit and advantage thereof, and all the estate, right, title, interest, incumbrances made or suffered by him, or by their or either of their acts or privity; then followed a covenant for further assurance by the assignor, his executors and administrators, and all persons whomsoever, claiming under him:—Held, that the general words in the covenant for quiet enjoyment, were restrained by the restrictive words in the covenants for title and further assurance, which preceded and followed it, and therefore that such covenant was confined to the acts of the covenantor and those claiming under him.

The assignor of a lease, covenanted that for and notwithstanding any act or thing by him done, the lease was valid; and further, that it should be lawful for the assignee at all times during the term, quietly to enjoy, without the lawful let or interruption of the assignor, his executors, administrators, or assigns, or any of them, or any other person or persons whomsoever, claiming any estate or right in the premises, and that, clearly discharged by the assignor, his heirs, executors, or administrators, from all former



1819.

NIND  
v.

MARSHALL.

and term for years then yet to come and unexpired therein, trust, possession, property, possibility, claim, and demand whatsoever, as well legal as equitable of him the defendant, of, in, to, or out of the said premises or any part thereof, To have and to hold the same, unto the plaintiff, for and during all the rest, residue, and remainder of the said term of fourteen years, thereof granted by the said in part recited indenture of lease, subject, nevertheless, to the payment of the yearly rent, and to the performance of the covenants, conditions, and agreements, by and in the said in part recited indenture of lease reserved and contained. And the defendant did, by the said indenture, amongst other things, covenant with the plaintiff, " That it should and might be lawful to and for the plaintiff, his executors, administrators, and assigns, from time to time, and at all times thereafter, peaceably and quietly to enter into, have, hold, use, occupy, possess, and enjoy the said messuage, tenement, or dwelling-house, and all and singular the premises thereinbefore mentioned and intended to be thereby assigned, with their, and every of their appurtenances, and to have, receive, and take the rents, issues, and profits thereof, and of every part and parcel thereof, for and during all the rest, residue, and remainder of the said term of fourteen years by the said in part recited indenture of lease granted, and then to come and unexpired, without any the lawful let, suit, trouble, hindrance, interruption, molestation, or denial of the defendant, his executors, administrators, or assigns, or any of them, or any other person or persons whomsoever having, or lawfully claiming, or who should or might at any time or times thereafter, during the said term, have or lawfully claim any estate, right, title, trust, or interest, either at law or in equity, of, in, to, or out of the said messuage, tenement, or dwelling-house and premises, or any part or parcel thereof, and that free and clear, and freely and clearly acquitted, exonerated, and discharged; or other-

wise, by the defendant, his heirs, executors, or administrators, well and sufficiently saved, defended, kept harmless and indemnified, of, from, and against all and all manner of former and other gifts, grants, bargains, sales, leases, mortgages, assignments, rents and arrears of rent, statutes, judgments, recognizances, titles, charges, and incumbrances whatsoever, made, done, or committed, or wittingly or willingly permitted or suffered by the defendant, or by, through, or with his, their, or either of their acts, means, default, procurement, consent, or privity, subject only to the rents, covenants, and agreements by and in the said thereinbefore in part recited indenture of lease reserved and contained, and on the tenants, lessees, or assignees part thenceforth to grow due and to be performed, fulfilled, and kept."—By virtue of which indenture, the plaintiff, on the 5th of *July*, 1817; entered into the assigned premises, and became possessed thereof until the eviction and expulsion thereafter mentioned;—The plaintiff then averred a performance of covenants on his part, and assigned for breach; that after the making of the said indenture, and before the expiration of the said term of fourteen years thereby assigned to the plaintiff, to wit, on the 1st of *April*, 1818, one *Sarah Parker*, widow, having, and lawfully claiming to have, lawful right and title to the said messuage, tenement, or dwelling-house and premises by the said indenture assigned, with the appurtenances, and having a lawful right of entry into the same, and lawful title, not derived by, from, under, or by means of the plaintiff, or any act done by the plaintiff or with his consent, entered into and upon the said premises, by the said indenture assigned, and in and upon the possession of the plaintiff thereof, and lawfully ejected him from and out of the possession of the same premises with the appurtenances; and hath lawfully kept the plaintiff so thereout ejected for a long time, to wit, from thence hitherto, contrary to the form and effect of the indenture and of the covenant of the

1819.

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NIND  
v.

MARSHALL.

1819.

NIND

v.  
MARSHALL.

defendant in that behalf made as aforesaid; By reason whereof the plaintiff hath not only lost and been deprived of the said sum of £20, so paid by him to the defendant, and of the use and benefit of the said messuage and premises, but hath also been forced to lay out and expend a large of sum money about repairing and improving the same.—The defendant craved oyer, and the indenture between him and the plaintiff was set out; and immediately preceding the above covenant for quiet enjoyment, the defendant covenanted with the plaintiff, “That for and notwithstanding any act, deed, matter, or thing whatsoever by him, the defendant, at any time theretofore made, done, committed, permitted, or suffered, the said thereinbefore in part recited indenture of lease was a good and subsisting lease, valid in the law, whereby to hold the said messuage and premises for all the residue of the term thereby granted, and not forfeited, surrendered, or otherwise determined or become void or voidable;” then came the covenant by the defendant for quiet enjoyment, introduced by the words, “*and farther that,*” in the same terms as was set out in the declaration;—Then followed a covenant for farther assurance in the following terms “And moreover that the defendant, his executors and administrators, and all and every other person or persons whomsoever, having, or lawfully claiming, or who should or might at any time thereafter, during the residue of the said term, have or lawfully claim any estate, right, title, or interest, either at law or in equity, of, in, to, or out of the said messuage, tenement, or dwelling-house and premises thereinbefore mentioned and intended to be thereby assigned, or any of them, or any part or parcel thereof, by, from, under, or in trust for him or them, should and would, from time to time, and at all times thereafter, upon the reasonable request and at the proper costs and charges in the law, of the plaintiff, his executors, administrators, or assigns, make, do, and execute, or cause and procure to be made, done, and exe-

cuted, all and every such further and other lawful and reasonable act and acts, thing and things, assignments and assurances in the law whatsoever, for the further, better, more perfect, and absolute assigning and assuring of all and singular the said messuage, tenement, or dwelling-house and premises thereinbefore mentioned and intended to be thereby assigned, with their and every of their appurtenances, unto the plaintiff, his executors, administrators, and assigns, for all the residue and remainder which should be then to come and unexpired of the said term of fourteen years therein granted by the said thereinbefore in part recited indenture of lease, as by the plaintiff, his executors, administrators; or assigns, or his or their counsel or attorney should be lawfully and reasonably devised, advised, or required."—The defendant then demurred to the declaration, and assigned for causes:—that it did not appear in or by the said declaration that the said *Sarah Parker* had, or lawfully claimed to have, lawful right or title to the said messuage, tenement, or dwelling-house and premises by the said indenture assigned, with the appurtenances, or had a lawful right of entry into the same by means or in consequence of any act, deed, matter, or thing whatsoever by him the defendant at any time before the making of the said last-mentioned indenture, made, done, or committed, or wittingly and willingly permitted or suffered:—And also that it did not appear in or by the said last-mentioned indenture, that the said *Sarah Parker* had, or lawfully claimed to have, lawful right or title to the said messuage, tenement, or dwelling-house and premises by the same indenture assigned, with the appurtenances, by means or in consequence of any former or other gift, grant, bargain, sale, lease, mortgage, assignment, rent, or arrears of rent, statute, judgment, recognizance, title, charge, or incumbrance whatsoever, made, done, or com-

1819.

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NIND  
v.

MARSHALL.

1819.  
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 NIND  
 v.  
 MARSHALL.

mitted, or wittingly or willingly permitted or suffered by the defendant, or by, or through, or with his acts, means, default, procurement, consent, or privity. And also that the said declaration was in other respects uncertain, insufficient, and informal, &c.—The plaintiff joined in demurrer.

This case was argued in the course of the last Term, and the question raised by the demurrer was, whether the covenant for quiet enjoyment was a covenant against all the world, or limited to the acts of the defendant and those claiming under him.

Mr. Serjt. *Lawes*, in support of the demurrer, insisted, that this was not an absolute covenant on the part of the defendant, but qualified or restrained against his own acts only, and not against the acts of all the world. It is apparent on the whole of the deed that it must be so considered. The rule applicable to this case is laid down in that of *Gainsford v. Griffiths*, (a), which is the leading decision on this subject, and it is there said, “that if a restrictive clause be in the first or last part of a sentence, or at the beginning of the first, or at the end of the last sentence, which in good sense may be applied to one or the other, there it shall extend to both sentences, but that it is otherwise if such sentence be placed in the middle of one or two sentences.” There, although the covenants were not so blended, but that the first might stand absolute, yet the rule in that case is clearly laid down, and confirmed by Mr. Justice *Heath*, in the case of *Browning v. Wright* (b), who there said, that “Where any sentence contains distinct covenants, and there are words of restriction either in the prefatory or concluding part, these words must be extended to

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(a) 1 *Wms. Saund.* 60.—— (b) 2 *Bos. & Pul.* 27.

every part of the sentence, unless the intention of the parties appear to require a contrary construction." Here, the covenant for quiet enjoyment is one continued sentence, and must be taken altogether, and there are qualifying words at the beginning and end of it, and not in the middle. And this is followed by a covenant for further assurance, which is of the same qualified nature, namely, that the defendant and all persons claiming *under him*, shall give further assurance for the term assigned. The intention of the parties is manifest throughout. The defendant, at the commencement of the covenant for quiet enjoyment, merely covenants for his own acts, and although the general words, that the plaintiff shall enjoy without the molestation of the defendant, or *any other person or persons whatsoever*, yet how he is to enjoy, the latter part of the same covenant clearly shews, namely, "*and that free and clear* of all acts done by the defendant or those claiming under him." The latter part of that covenant, therefore, is as equally qualified as the introductory, and coupled with that for further assurance, confirms the covenant to the defendant alone, and those who derive a title under him. In *Gainsford v. Griffiths*, the Court held that the first sentence ran distinct from, and contained a general covenant not restrained by the latter. Here, the covenants are not only restrictive, but consistent both in their beginnings and conclusions. [Lord Chief Justice *Dallas*.—How do you distinguish this case from that of *Howell v. Richards* (a) ?]

There, after the general words or *any other person whatsoever*, the clause, free and clear, is equally as general as the previous words, and there is no qualifying

1819.  
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NIND  
v.  
MARSHALL.

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(a) 11 *East*, 633.

1819.  
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 NIND
 v.
 MARSHALL.

covenant to succeed it, with one exception only, viz. "*save and, except the chief rent,*" and *expressio unius est exclusio alterius*. Here there is no exception, and the intention of the parties must be collected from the whole of the indenture taken collectively, and not from a single passage alone. He also relied on the cases of *Broughton v. Conway* (a), *Noble v. King* (b), and *Foord v. Wilson* (c), as being applicable to the former part of his argument.

Mr. Serjt. *Vaughan, contra*.—There can be no question as to the principle on which this case must be decided, namely, that the intention of the parties affords the true rule of construction, and that such intention is to be collected from the whole of the terms contained in the instrument itself, which clearly shew that the covenant for quiet enjoyment is not to be restrained, but is in effect a general and unqualified covenant as to all the world. Here there are three covenants; the first for title, the second for quiet enjoyment, and the third for further assurance. In the first, the defendant covenants that the lease in question is a good subsisting lease; the second is distinct and general, and not to be incorporated either with the one that precedes, or the other that follows it. No case resembles the present, as here, the covenant for quiet enjoyment must be considered as distinct and independent. In *Browning v. Wright* (d), the Court held that the covenant in question was to be taken as one sentence and one covenant, and Mr. Justice *Buller* there thought (e), that the person who drew that deed, intended that the two clauses should form but one covenant, but that not having strength of mind sufficient to carry him through one con-

(a) *Dyer*, 240. — (b) 1 *H. Bl.* 34. — (c) *Ante*, vol. II. — (d) 2 *Bos. & Pul.* 13. — (e) *Id.* 28.

tinued sentence of so great a length, he stopped, and introduced the words "*and that*," which created all the difficulty; that if they were struck out, the case would be as clear as the sun, and that the covenant would then stand thus, namely, "that the grantor covenanted, that notwithstanding any act done by him, he was seised of the estate, and had good title to convey." The two clauses, therefore, were there synonymous, and formed one sentence only, coupled by the words "*and that*," while here, there is a distinct covenant against the acts of all persons whatsoever. The case of *Foord v. Wilson* was not only similar to, but entirely governed by that of *Browning v. Wright*; besides, Lord *Eldon* distinguished the latter case from that of *Gainsford v. Griffiths*, which was of a leasehold estate, where the title not being so easily ascertained as in cases of freehold, the purchaser must require a greater security. So Lord *Ellenborough*, in the case of *Howell v. Richards* (a), said "It is perfectly consistent with reason and good sense, that a cautious grantor should stipulate, in a more restrained and limited manner, for the particular description of title which he purports to convey, than for quiet enjoyment." The case of *Gainsford v. Griffiths* resembles this in almost every circumstance, for there, as here, the property was leasehold, there also, were two covenants, the one for quiet enjoyment, the other that the lease was a good and indefeasible lease; the latter was general in its terms, and the covenant for quiet enjoyment there was, without any let or disturbance of the defendant, but here, the words "*or any other persons whatsoever*," are added; these cannot be expunged, nor can they be considered as surplusage; it is unusual to introduce them, and therefore if they are introduced, it must be the intention of the par-

1819.

NIND
v.

MARSHALL.

(a) 11 East, 642.

1819.
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 NIND  
 v.  
 MARSHALL.

ties that they shall become operative, which if they do, they can mean nothing less than an absolute covenant; here too, a stranger is the claimant. In *Browning v. Wright*, the covenants were construed as one; here, they are distinct and separate, and the covenant for quiet enjoyment cannot be restrained by the covenant for the title. In *Howell v. Richards*, the words introduced in the covenant for quiet enjoyment, were precisely similar to the present, except "the saving of the chief rent," but here the covenant must be construed to extend to all the world. The question in that case was, whether the general words of the covenant for quiet enjoyment were, in necessary construction, to be restrained by the language of the antecedent covenants for title and right to convey, which were covenants of a limited kind, and which provided only against the acts of the releasors themselves. And it was there held that the general covenant for quiet enjoyment was not to be qualified by the covenant against the acts of the releasors. Here, the three covenants are distinct; that for further assurance has nothing to do with the present question, and those for title and quiet enjoyment must be considered as independent and collateral. If the parties intended to restrain the general covenant for quiet enjoyment, they ought to have introduced other restrictive or qualified covenants, and stipulated more cautiously. The property, in the case of *Barton v. Fitzgerald* (a), was leasehold, and the doctrine there laid down is also in favor of the plaintiff.

Mr. Serjt. *Lawes* in reply.—The covenant for quiet enjoyment here is most clearly restrained by the qualifying words contained in the deed. The question as to con-

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(a) 15 East, 530.

struction, depends on the intention of the parties expressed, not in this covenant only, but in the whole of the deed. Lord *Eldon* said, in *Browning v. Wright*, that a whole series of covenants, though consisting of many sentences, may be considered as one covenant; if so, the covenant for quiet enjoyment here cannot be general, as it is qualified both in the former and latter part of the sentence. Where covenants are inconsistent with each other, they cannot be considered together. In *Gainsford v. Griffiths*, the words of the covenant were limited, and formed two distinct sentences, the latter of which did not restrain the former. Although here, general words are introduced in the middle of the covenant for quiet enjoyment, still they are followed by words of indemnity, and words of restriction precede as well as succeed those general ones. It is true that the words, "other person or persons whatsoever," appear to be general, and if the covenant had stopped there, it might be difficult to distinguish this case from *Gainsford v. Griffiths*, but it goes on to shew against what acts the plaintiff shall have quiet enjoyment; and all these are merely acts of the covenantor or those claiming under him. These words alone would restrict the preceding general ones, although the prior words of restriction in the covenant had not been introduced at all. The case of *Foord v. Wilson* is applicable to the present; that was a covenant for title, and that the defendant had done nothing to encumber the premises; and that, notwithstanding any such act, matter, or thing, that the lease was a good and valid lease, and that *Wilson* had good right, full power, &c. to convey; and the Court held that these general words were qualified by the antecedent covenants, which were of a limited nature; the breach there assigned was, not that it was not a good subsisting lease, but that the defendant had not good power to sell, and the Court said it might be considered as one covenant;

1819.

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 NIND  
 v.

MARSHALL.

1810.  
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 NIND
 v.
 MARSHALL.

so there, as in *Browning v. Wright*, the general covenant was restricted by words in the beginning of the sentence, but here there are subsequent as well as preceding words to give the true construction. The indemnity intended to be given by the defendant, is confined to acts done by himself, and not to be co-extensive with the general covenant as against all the world. The case of *Howell v. Richards* is distinguishable from the present, for although that was an action for quiet enjoyment, and the covenant was there held to be absolute, yet it was followed up by a continuing covenant for indemnity, co-extensive with that for quiet enjoyment; although the words there were in great part similar to the present, yet they cannot be considered *ejusdem generis*, for there was an exception, and that too an incumbrance not arising from the act of the party, namely, the saving of the chief rent by the lord of the fee, which clearly shews that the indemnity, in other respects not included in the exception, was meant to extend to acts of strangers. Here it is directly the reverse; this was not intended to be a general covenant against all incumbrances, but only those which the defendant himself had created, he therefore only covenanted against his own acts. The covenant for further assurance is also confined to him alone. If the covenant for quiet enjoyment were general, it would be repugnant to the other parts of the deed. Although covenants must be taken most strongly against the covenantor, still, from the intention of the parties, it could never be meant here, that the defendant intended to covenant against all the world. The plaintiff must say, that although the defendant had only covenanted against his own acts for the validity of the lease, and against his own incumbrances only for indemnity, yet that he had been so inconsistent as to covenant for quiet enjoyment against the acts and incumbrances of all mankind. A distinction has been drawn between freehold and leasehold property,

and it has been contended that the latter should be watched most strictly; but on the contrary, more indulgence should be shewn to leasehold, as it is far more probable that the owner of a fee, knowing the extent of his own property, should covenant more absolutely than the assignor of a lease who could not ascertain the title of his lessor. The case of *Barton v. Fitzgerald* is wholly beside the present question, which must be governed by the intent of the parties. There it was clearly intended to modify the general words in the body of the covenant for quiet enjoyment, so as to confine it to the acts of the covenantor and those claiming under him.

1819.

 NIND
 v.
 MARSHALL.

Cur. adv. vult.

The Court being divided in opinion, they, on this day, delivered their judgments *seriatim*, as follows:—

Mr. Justice RICHARDSON.—This is an action founded on a covenant for quiet enjoyment contained in an indenture of assignment, by which the defendant assigned all his interest in a lease for a term of years, to the plaintiff; and the breach assigned was an eviction of the plaintiff by a stranger; to this declaration the defendant, after having craved oyer of the lease, has demurred; and the question arising on the demurrer is, whether the covenant for quiet enjoyment be an absolute or a qualified covenant. The principle to be followed in the construction of a deed, is the intention of the parties, to be collected from a due consideration of the whole of the instrument. This being so, I proceed to apply it to the indenture in question. This instrument begins with reciting a lease granted on the 9th December, 1815, by one *John Parker* to the defendant, of a messuage and premises, to hold the same to the defendant from the 25th December, 1813, for the term of fourteen years, subject to the payment of the

1819.

NIND

v.

MARSHALL.

yearly rent of £12, payable quarterly, and to the performance of the covenants therein contained. It then recites that the plaintiff had contracted with the defendant for the absolute purchase of the said messuage and premises demised by the said lease, and all his estate, term, and interest therein, for the sum of £20; in consideration of which sum, the defendant bargained, sold, and assigned to the plaintiff the said messuage and premises comprised in the said indenture of lease, and thereby demised, or mentioned, or intended so to be, together with the said indenture of lease, and all benefit and advantage thereof, and all the estate, right, title, interest, term for years to come and unexpired therein, trust, possession, property, possibility, claim, and demand whatsoever, as well legal as equitable, of him the defendant, of, in, or to the said premises:—To have and to hold the said messuage and premises to the plaintiff, for and during all the rest, residue, and remainder then to come and unexpired of the said term of fourteen years, thereof granted by the said indenture of lease, subject to the payment of rent and performance of covenants. Then follow the covenants by the defendant to the plaintiff; the first, for the validity of the lease, is clearly a qualified covenant, being, that for and notwithstanding any act, deed, matter, or thing whatsoever by the defendant done, committed, permitted, or suffered, the said in part recited indenture of lease was a good and subsisting lease, valid in the law, whereby to hold the said messuage and premises for the residue of the term thereby granted, and not forfeited, surrendered, or otherwise determined or become void or voidable. Then comes the covenant for quiet enjoyment, on which the breach is assigned, which is introduced by the words, “and further that,” and runs thus, “that it shall be lawful for the plaintiff, at all times, peaceably and quietly to enter into, occupy, and enjoy the said messuage and premises for and during all the rest, residue, and remainder

of the said term of fourteen years by the said in part recited indenture of lease granted and then to come and unexpired, without any the lawful let, suit, trouble, hindrance, interruption, molestation, or denial of the defendant, his executors, administrators, or assigns, or any of them, or any other person or persons whatsoever, having or lawfully claiming, or who should at any time thereafter, during the term, have, or lawfully claim any estate, right, title, &c." Then follows another covenant for further assurance, which is also a qualified covenant. It has been argued that the words in this covenant for quiet enjoyment, "*or any other person or persons whatsoever*," especially as they are superadded to the express mention of the covenantor himself by name, and his executors, administrators, and assigns, must extend, in necessary construction, to all mankind having lawful title, however derived. But it is to be observed, that the covenant for quiet enjoyment does not end here, but goes on to particularize the grounds, or causes of let or interruption, from which the enjoyment covenanted for, is to be free and clear; and all these causes will be found to be such as arise from acts done, or defaults made by the covenantor himself; these are the restrictions in that part of the covenant. The Court is bound to give effect, if possible, to every part of the deed; but it is clear that the latter part of this covenant will be made wholly nugatory and inoperative if the former be construed as an absolute covenant for quiet enjoyment against all mankind, on whatever grounds or causes they may found or derive a title, for what would be the effect or use of superadding that no statute or recognizance acknowledged, or judgment suffered by the defendant, should operate to the plaintiff's disturbance, if the former part of the covenant stands absolute and unqualified, that no lawful claim whatsoever should operate to his disturbance? But these latter words will be operative and im-

1819.

NIND

v.

MARSHALL

1819,
 NIND
 v.
 MARSHALL.

portant if they be considered as specifying the grounds of interruption or disturbance from which the stipulated enjoyment is to be free and clear. It may be said, however, that this construction, by thus giving effect to the latter qualifying words, may fall into the same fault which it professes to avoid, by rendering inoperative the absolute words so much relied on, "or any person or persons whatsoever;" but if these words be coupled with the qualifying words superadded, it seems to me that they will not be altogether inoperative, and although they may be restricted in sense, still that they do not lose their effect; for the former part of the covenant, prior to the words in question, engages only that there shall be a quiet enjoyment, without the let, hindrance, or interruption of the defendant himself, his executors, administrators, or assigns; and if other words, descriptive of a larger class of persons, had not been superadded, it would have been at least doubtful whether a disturbance, arising from an underlease, or rent-charge, or annuity secured by power of distress, or recognizance, or judgment, all of which amount to a disturbance, would have been provided for. But all these dangers are now effectually excluded, if the view I have taken of the construction of this covenant be adopted, and it stands, in effect, thus:—That there shall be a quiet enjoyment during the residue of the term, free from, or indemnified against all interruption, not only on the part of the covenantor himself, his executors, administrators, or assigns, but on the part of all other persons whatsoever, lawfully deriving any title or interest from the acts or defaults of the covenantor, his executors, administrators, or assigns. The case of *Gainsford v. Griffiths* is a strong authority in favour of the plaintiff, but is distinguishable from the present, on the ground that the covenant for the validity of the lease, on which alone the Court there proceeded, was an independant covenant, and

such as could not be connected in grammar or construction with the subsequent covenant, but was by itself clearly absolute, containing no words of qualification whatever; whereas here, the words of qualification may, and ought to be considered as part of the covenant for quiet enjoyment. The same construction may be put on the case of *Barton v. Fitzgerald*, as on that of *Gainsford v. Griffiths*, as the effect is the same in both. This case is also distinguishable from that of *Howell v. Richards*, which has been so much relied on for the plaintiff, because the clause as to incumbrances, (which formed the strength of the argument in favour of the defendant here,) there formed the strength of the argument against him; that clause contained words as general as those which preceded, with one single exception, namely, the *chief rent*, which was not arising from an act or default of the party, or of any claiming under him;—this exception therefore in that case afforded strong terms to confirm the generality of all the other words. This being the case, it appears to me, that this is a covenant for a qualified and not an absolute enjoyment, and therefore that the breach in the declaration is not well assigned.

1819.
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 NIND  
 P.  
 MARSHALL.

Mr. Justice BURROUGH.—In delivering an opinion in cases of this description, it is necessary to have reference to what has preceded the covenant, on which the action is brought. The whole of the deed of assignment on which the present question arises, is stated in the plea. The assignment recites the lease assigned, by which it appears that the defendant held the premises for the remainder of a term of fourteen years, commencing from the 25th *December*, 1813. The contract between the parties, is for the absolute purchase of the messuage and premises contained in the indenture of assignment, and all his, the defendant's *term, estate, and interest*



1819.  
 ~~~~~  
 NIND
 v.
 MARSHALL.

therein, for the sum of £20. There is nothing in the deed to shew (unless the covenant in question does so,) that the assignor meant, at all events, to warrant that the lease should endure during the term. In questions of doubt, as to the construction of a covenant in a deed, the invariable rule is, that the construction must be made according to the intention of the parties to be collected from the whole deed. The rule laid down in *Gainsford v. Griffiths*, and referred to in the argument for the plaintiff, namely, "that if a restrictive clause be in the first or last part of a sentence, or at the beginning of the first, or at the end of the last sentence, which, in good sense, may be applied to one and the other, then it shall extend to both sentences," is not the rule now observed. Mr. Serjt. *Williams* remarked in his note to that case, in speaking of the above rule, that "it is questionable whether much regard would now be paid to this mode of construction." Such a rule has never been adopted or acted upon for the last forty years, but on the contrary, it has been always said, that the construction must be governed by the intention of the parties, to be collected from the context matter, by a due attention to the whole of the deed or instrument. If the covenant on which the question in this case arises, is considered by itself, I am of opinion, that it is a qualified covenant. I feel it impossible to entertain a contrary opinion, without laying aside all the words which follow the words "*and that*." The particular covenant is for quiet enjoyment, without the let or denial of the defendant, his executors, administrators, or assigns, or any of them, or any other person or persons whomsoever, having, or lawfully claiming, any estate, &c. Then follow the words "*and that*," &c. In my judgment, these words over-ride the whole of the preceding part of the sentence, and shew that it was the intention of the parties, for the plaintiff to have quiet en-

joyment, without the denial of the defendant, his executors, administrators, and assigns, or any person or persons whomsoever, free, &c. and acquitted, &c., or otherwise, by him the defendant, his heirs, executors, or administrators, kept harmless against all former gifts, grants, bargains, sales, &c. &c. made, done, or committed by him, or by or through him, or his or their acts or defaults. This appears to me to be one entire covenant, and being so, I think it is an inevitable legal consequence, that the latter part is restricted by the former. It is now proper to notice the case of *Howell v. Richards*. The deed is so stated in the report, that a person does not immediately discover what the covenant really was, but the moment the different parts of the covenant are put together, *cessat questio*. The covenant runs thus, "*And likewise that he the said Rd. Howell, his heirs, &c. shall and may from time to time, and at all times for ever hereafter, peaceably hold, and quietly enter into, hold, occupy, possess, or enjoy, the premises thereby granted, &c. without the lawful let, suit, &c. or disturbance whatsoever, of or by reason of the said J. Richards, Anne his wife, the defendant T. Richards, and D. Richards, or any or either of them, or any or either of their heirs or assigns, or of or by any other person or persons whatsoever.*" Then the report says, "concluding as stated in the declaration." The conclusion in the declaration, immediately following these words, is "*and that freely and clearly, and absolutely acquitted, &c. or otherwise by the said J. Richards, &c. well and sufficiently saved, defended, kept harmless, and indemnified against all former and other gifts, grants, jointures, dowers, uses, trusts, wills, statutes, &c. and of, from, and against, all other, estates, titles, troubles, charges, and incumbrances whatsoever, save and except the chief rent to the lord of the fee issuing out of, or payable for the said premises.*"

1812.
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 NIND  
 v.  
 MARSHALL.

1819.

NIND

v.

MARSHALL.

So that if the whole be taken together, the first and the last parts are equally general, save the exception of the chief rent in the latter part, but here the first part of the covenant is general and qualified by the latter. An important question arose in that case on the exception of the rent, namely, if the covenants were to be considered as two, could the purchaser take the first part of the covenant, and contend that the words "of or by any other person or persons whomsoever," would entitle the tenant to an action, if the rent was distrained for by the lord? I think not,—and why? Because it is all one covenant, and the rent is as much excepted out of the former, as out of the latter part. But in questions of this nature, there is another weighty consideration; the Court ought (if they can do so without violence to the words,) to put such a construction on the instrument, as to make the different parts of the deed consistent with each other. Here there are three covenants in the deed, the first, "That for and notwithstanding any act, deed, matter, or thing whatsoever, by him the defendant, at any time theretofore made, done, committed, permitted, or suffered, the indenture is a good and subsisting lease, valid in the law, whereby to hold the premises for all the residue of the term thereby granted, and not forfeited, surrendered, or become void or voidable." Undoubtedly, that is not a qualified covenant. The second covenant is that on which the present question arises, and is for quiet enjoyment. It is inconsistent with the first covenant to construe this to be a covenant warranting the quiet enjoyment of the lease, against all the world, and it is consistent with it to hold it to be a qualified covenant. The third covenant for further assurance, is for the defendant himself, his executors and administrators, and all persons whomsoever, who, during the term, shall have, or lawfully claim, any estate, right, title, or interest, either at

law or in equity, of and to the premises, by, from, under, or in trust for him or them. This too, also extends only to the defendant himself, and those who shall claim by, from, or under him. By construing the covenant for quiet enjoyment to be a qualified covenant, the whole of the deed will tend to the same object; but if the second covenant has the effect contended for by the plaintiff, namely, to be absolute, the first is wholly useless. It is further consistent with the third covenant to hold the second to be a qualified and restricted covenant. On the whole, therefore, I am of opinion, that the judgment must be for the defendant, because, I think, on the true construction of the particular covenant for quiet enjoyment, as taken by itself, and aided by a due attention to the whole of the deed, the defendant has only covenanted against his own acts, and the acts of those who shall claim by or through, or with the acts, means, default, procurement, consent, or privity, of him or his executors, administrators, or assigns.

1819.  
 NIND  
 v.  
 MARSHALL.

Mr. Justice PARK.—As my two learned Brothers who have preceded me, and I believe my Lord Chief Justice also, differ from me on this occasion, I cannot but deliver my sentiments with great diffidence and distrust of the opinion I have formed. I have this consolation, however, that my differing from them proceeds not from perversity of disposition, nor from an overweening conceit of my own judgment. I have turned this case in my mind, in every possible way. I have not only listened with the greatest attention to all the arguments that have been adduced for the plaintiff and defendant, but have read and studied every case that bears on the present question, and still not being enabled to bring my understanding to a conformity with opinions which I so highly respect, I must deliver my own genuine sentiments, however erroneous the judgment which

1819.  
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 NIND
 v.
 MARSHALL.

I have formed may appear to others. And as I differ from my Lord Chief Justice, and both my Brothers, I am afraid I must take up longer time than either of them, and deliver my sentiments at length, as I am not only anxious to shew that it is not without the deepest conviction that I differ from such high and learned authority, but to be satisfied that the judgment for the defendant may be correct. In the discussion of this case, I wish it to be fully understood, that I do not consider myself as giving an opinion in contradiction to the cases already decided; but I hope to be enabled to shew, (at least I have so convinced myself) that my judgment is supported by all of them, with the exception of one. This case, which respects a leasehold estate, has been truly stated at the bar, to depend upon the question, whether the covenant for quiet enjoyment, set out on *oyer*, is a qualified or absolute covenant [here the learned Judge read that covenant]; and I admit, in the fullest terms, that were it not for the words "without any the lawful let, hindrance, interruption, molestation, and disturbance of the defendant, his executors, administrators, or assigns, or any of them, or any other person or persons whatsoever, having, or lawfully claiming, any estate, right, title, and interest, to the premises," I should be of opinion with the defendant, but except in the case of *Broughton v. Conway* (a), (which I shall comment upon presently) I do not find the general words, "any other person or persons whatsoever," in any covenant which has been held restrictive, and therefore with all the cases but that, I am most fully prepared to coincide. I enquired with some solicitude, during the argument in this case, whether those words could be read as sensible and intelligible,

(a) *Dyer*, 240.

1819.

NIND

v

MARSHALL.

without reference to the former part of the sentence; but the learned Counsel could not give me a satisfactory answer. I enquired also, if any authority could be furnished, for rejecting these words altogether; but that of course could not be done. I admit, that although the maxim, *verba cartarum fortius accipiuntur contra proferentem*, is to be qualified by this observation, namely, that regard must be paid to the intention of the parties, as it is to be collected from the whole of the context of the instrument, still, I cannot reject words which the parties have chosen to introduce into their contract. I know, that in all the previous cases it has been held, that no word ought, if possible, to be rendered inoperative, and I conceive, that by reading the present deed as the defendant wishes it to be read, the whole passage in question, consisting of upwards of four lines, must be rejected or rendered wholly inoperative, as a vain and idle repetition; whereas, as I propose to read it, each part is sensible and intelligible. It contracts for something distinct from what had before been provided for, and there is nothing in the language tautologous, or to be rejected as surplusage. But, it is said, it is impossible that any man could so mean to contract, and that the words introduced in the prior part of the covenant, shew that the covenantor meant to restrain it to his own acts, "for and notwithstanding any act, matter, or thing theretofore done, permitted, or suffered by him the defendant," in the covenant for title. Those words are to be found also introducing the like covenant in the case of *Howell v. Richards*. The covenant for title, and the covenant to convey, are necessarily restrained to the acts of the covenantor or his heirs, executors, administrators, or assigns, but not so the covenant for quiet enjoyment; and therefore, in reason and good sense, the covenantor may well make a distinction, and say, notwithstanding any act done by him, he has a good title,

1819.
 NIND
 v.
 MARSHALL.

and has a right to convey; but the covenantee may also well insist, "it is enough for you so to declare as to yourself, but I will also insist that I shall not be disturbed in my enjoyment by any person whomsoever." Lord *Ellenborough*, in *Howell v. Richards* (a), said, "It is perfectly consistent with reason and good sense, that a cautious grantor should stipulate in a more restrained and limited manner for the particular description of title which he purports to convey, than for quiet enjoyment. He may suspect, or even know, that his title is, in strictness of law, in some degree imperfect; but he may, at the same time, know that it has not become so by any act of his own; and he may likewise know, that the imperfection is not of such a nature as to afford any reasonable chance of disturbance whatever, to those who should take under it; he may therefore very readily take upon him an indemnity against an event which he considers as next to impossible." Mr. Justice *Le Blanc* also said, in the case of *Barton v. Fitzgerald* (b), "I cannot say that an assignee would not require an absolute covenant for a valid lease, during the whole term bargained for, though he also required a covenant against the parties' own acts." Even Lord *Eldon*, in the case of *Browning v. Wright*, which has been so much relied on for the defendant, and on which I also rely, said (c), "*Prima facie* in the conveyance of an estate of inheritance, we are led to expect no other covenants than those which guard against the acts of the vendor and his heirs. With respect to the conveyance of leasehold estates, this is not always so; and there is an obvious reason why this should not be so. Some of the cases rest on the distinction between freehold

(a) 11 *East*, 642.——(b) 15 *East*, 545, 6.——
 (c) 2 *Bos. & Pul.* 23.

and leasehold property; and in that case cited from that excellent book, the Reports of *Saunders*, made more excellent by a late edition, the estate was leasehold. All the muniments of a freehold estate, and every thing which can illustrate the title, is in possession of the vendor; but this is seldom the case with respect to leaseholds. It sometimes happens, that the parties require covenants in assignments of this kind of property, which are not required in conveyances of freehold. I own I can see no good reason why; on the one hand we are to suppose, in order to get rid of a covenant, that it is very unlikely a covenantor (who has done so), should wish to undertake for all lawfully claiming, and yet, not to suppose on the other as Lord *Eldon* has done, that a covenantee was very likely to insist on it; and why are we to reject a covenant in express words, evidently in favour of the assignee, merely because we think it improbable (that is, in other words, because with our knowledge of the consequences, we would not,) that a man should so undertake and covenant? It seems to me, that an argument of no inconsiderable weight, is to be drawn from the connecting particle in the covenant. After covenanting against the lawful let, interruption, and disturbance of the defendant, his executors, administrators, and assigns, these words are added, "or any other person or persons whatsoever, claiming, or who should thereafter claim any right or title to the premises," which must mean persons of another description, than those before-mentioned; for, if persons *ejusdem generis*, with those already mentioned, were intended, the covenantor would have said, "and any other person or persons whatsoever." But I think the strongest argument is to be collected from the concluding words of this covenant, as contrasted with those to be found in the passage in question. In this branch of the sentence, the defendant covenants for himself, his executors, administrators, or assigns, and adds,

1819.

NIND

v.

MARSHALL.

1819.

NIND

v.

MARSHALL.

(having covenanted against the acts of all claiming under him), "*or any other person or persons whomsoever.*" But when he covenants against former gifts, grants, &c. willingly permitted or suffered, he does so for himself, his heirs, executors, or administrators; and there he limits his assurance or covenant, against all persons claiming under him, so that he evidently limits the responsibility, where he means to restrain it, and leaves it general, where he means it to be so; and the limitation of it in one place, is, in my opinion, decisive, that he would have limited it in the other, if he had so intended. Therefore, though I admit the general rule to be, that the general words of a deed, are to be restrained by other parts of it, if the intent so to restrain them be apparent, yet I think it would be of the most dangerous consequences, if the Judges of the land were to permit themselves to exercise vague conjectures about the hardship of cases, and to consider ingeniously, what the parties must have meant, when the words used are clear and precise, and admitting of no ambiguity whatever, and when the mode which the plaintiff points out, gives to every branch of the covenant a clear and determinate meaning. This would, be in effect, to make a new deed for the parties, and not to pronounce upon the contract, which they have made for themselves. But it is singular to observe, that the very words which I have relied on, (to shew that when the covenantor meant to restrain his liability, he has done so by express words, having no ambiguity, but has left the words against "*all persons whomsoever,*" when he meant to covenant generally), are considered as decisive for the defendant, for, it is said, he has shewn what he meant by the general words "*all persons whomsoever,*" in the covenant for quiet enjoyment, by immediately adding, "*and that free and clear, and freely and clearly acquitted, &c.*" To which I answer,

that the very same argument arose in the case of *Howell v. Richards*, for, in that case, as in this, the covenant begins with a restriction. It is then followed by the general words, as in this case, adding, as here, "*and that freely and clearly, &c.*" and therefore I do not feel that I can decide this case with the defendant, without running in direct opposition to that of *Howell v. Richards*, of which I most fully approve. There, as well as here, the general words were preceded and followed by words of restriction; but I have already said, in effect, the use of both, shews that the covenantor knew the effect of both; I therefore conclude my observations on this part of the case, with the emphatic language of Lord *Ellenborough* in *Howell v. Richards*, because, in my judgment, it applies most strongly to the case now before us, and is much more powerful than any I could introduce of my own: "Consistently therefore," said his Lordship (a), "with the case of *Browning v. Wright*, and with every other that I am aware of, we are warranted in giving effect to the general words of the covenant for quiet enjoyment, and which are entitled to more weight in this case, inasmuch as they immediately follow;" (this is to be particularly remarked), "and enlarge the special words of covenant against disturbance by the grantors themselves; and to restrain the generality of these words, thus immediately preceded by express words of a narrower import, would be a much stronger thing than to restrain words of like generality by an implied qualification arising out of another covenant, where no such general words occurred. The person using the general words could not forget that he had immediately before used special words of a narrower extent. If the covenant containing both the special and general words,

1810.
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 NIND  
 v.  
 MARSHALL.

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(a) 11 *East*, 644.

1819.  
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 NIND
 v.
 MARSHALL.

stood by itself, (and here it is but one covenant), there would be no pretence for refusing effect to the larger words; and if this could not be done in favour of express words of a narrower import in the same covenant, I cannot possibly understand upon what ground it should be done in favour of implied words of narrower import, which occur in another separate covenant, addressed to a distinct object."—This seems to me to be decisive of the present case. As to the cases mentioned at the bar, in the course of the argument: *Broughton v. Conway* (a), was a case of a covenant in a lease, whereby the lessor covenanted that he had done no act to impeach, but that the assignee might quietly enjoy without let of him or any other person, &c. Taking it for granted, that "any other person, &c." means any other person whomsoever (and I admit it seems in all subsequent cases, and in the marginal note there, to be so considered), I must confess that to be an authority against my argument. But I answer, this is the only case, in which those words are to be found, which has received this exposition. It appears there to have been the opinion of two Judges only, and Mr. Justice *Brown* was strongly adverse to it; and a text-writer of the present day (b), truly observes on this case, "that the insertion of those words, is a circumstance which does not occur in any other of this line of cases, in all of which, no word is rendered inoperative, for where one covenant, or part of a covenant is general, I am of opinion that a subsequent limited covenant will not restrain the generality of the other covenant, unless an express intent to do so appear, or there be an inconsistency." With this observation, I now introduce the case of *Gainsford v. Griffiths*; there the defendant had covenanted, that

(a) *Dyer*, 240.—(b) *Sugd. Vend. & Furch.* 4th edit. 400.

1819.
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 NIND  
 v.  
 MARSHALL.

it was a good and indefeasible lease, and that the plaintiff should quietly enjoy, during the whole residue of the term, without any let or disturbance of the defendant. There it was contended, that the covenant that the lease was indefeasible was restrained: a stranger entered, and breach was assigned, that at the time of making the assignment, the lease was not good and indefeasible. The Court held, that the breach was well assigned, for that the first sentence was distinct, and contained a general covenant, not restrained by the latter sentence. Now, in this case, the latter sentence follows the first immediately, with the words "*and that the plaintiff should quietly enjoy, &c.*" The authority of this case, in point of law, has never been questioned; and it was lately mentioned with much approbation, and relied upon by that eminent and very learned Judge, Mr. Justice *Le Blanc*, in *Barton v. Fitzgerald*. Lord *Eldon* felt the difficulty arising from it, in giving the judgment of the Court in *Browning v. Wright*, for he stated that some of the cases depended on the distinction between freehold and leasehold property, and said the case cited from that excellent book, the Reports of *Saunders*, meaning the case of *Gainsford v. Griffiths*, was an estate of leasehold. That case, therefore, I consider as of unimpeached authority, and very strong in favour of the plaintiff's claim; nay, it was a stronger case to decide for the absolute nature of the covenant, for the general words are not in it. The case of *Noble v. King* (a), which has not been adverted to in the present argument, was a case of executors, who covenanted, as the defendant has done here, for there were the words, "any other person or persons whomsoever." It was there contended, that executors could only be understood to cove-

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(a) 1 H. Bl. 34.

1810.  
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 NIND
 v.
 MARSHALL.

ment against their own acts, or the acts of persons claiming under them; but the counsel who argued that case, never seem to have thought, that such a covenant would not have bound a common covenantor against the acts of a stranger; but that case was not decided, for it went off upon another point. This brings me to the case of *Browning v. Wright*, which, it is supposed, is decisive, in favour of the defendant. First of all, I would say, if it were necessary to get rid of that case, that it is a case of freehold, and not of leasehold, a distinction there pointed out, and the reasons for the distinctions assigned by Lord Eldon, in giving his opinion (a). In the next place I would observe, that the question there, did not arise upon the same branch of the covenant as in the present. Here it is upon that part of the covenant, in which the defendant covenants for quiet enjoyment; in that case, the covenantor only covenanted for quiet enjoyment, without the disturbance of him, or any other person or persons claiming under him. There too the question turned upon the covenants for title, and having a power to convey, and as to those, one would say, generally speaking, that a man would only be inclined to covenant, that, as far as he knew he had a good title, and that notwithstanding any act done by him, he had a power to convey. But the main distinction between the cases, (and upon which I strongly rely,) is, that in the case of *Browning v. Wright*, the words "or any other person or persons whomsoever," are not to be found; and therefore, as long as words are to have any force, I cannot withhold their natural and legitimate meaning; in short, I consider that case so clear, that I conceive it only required to be looked at by the very learned Judges, who decided it, to draw the conclusion which they did; and it was on the

(a) 2 Bos. & Pul. 23, 21.

1819.

NINTH

v.

MARSHALL.

same principle on which that case was decided, and as not distinguishable from it, that I concurred most readily with my Lord Chief Justice and my Brother *Burrough*, in *Foord v. Wilson* (a). The covenant there, was expressly and clearly intended to be a restricted covenant, for, after stating that the covenantor covenanted that he had done no act to charge, incumber, or affect, it went on thus, "and that, for, and notwithstanding any *such* act, deed, matter, or thing, the said lease was a good, valid, and subsisting lease," namely, by the pronoun of reference "*such*," pointing at his own acts alone. Above all, in *Foord v. Wilson*, are not to be found the general words, "any person or persons whomsoever," but, on the contrary, the words "person or persons," being once mentioned, they are immediately followed by the restrictive words, "claiming, or to claim under him or them." In the present case, on the contrary, as I have already observed, and in the branch of the covenant I am now commenting on, there is the general word "whomsoever," but, in the latter branch of the covenant, the covenantor adds the restriction, "claiming, or who shall thereafter claim the premises, or any part thereof; by, from, under, or in trust, for him or them," shewing most clearly, that he understood the distinction, and that he used the words generally, where he meant the covenant to be general; and restrictively, where he meant that the covenant should be restrained. The only remaining case, to which I shall allude, is that of *Howell v. Richards*, and, indeed, that is so much in point, that I cannot distinguish it from the present; there the judgment was delivered by Lord *Ellenborough*, after the Court had taken time to deliberate, assisted in those deliberations at

(a) *Ante*, vol. ii.

1819.
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 NIND  
 v.  
 -MARSHALL.

that time, by Mr. Justice *Grose*, Mr. Justice *Le Blanc*, and Mr. Justice *Bayley*, and they held most clearly, that the releasors, (although we find the words there, as here, "for and notwithstanding any act, &c. done by them, or any of them, to the contrary,") had a good title to convey; and also that they, "for and notwithstanding any such matter or thing as aforesaid," had good right and full power to grant; yet that those restrictive words did not restrain the general words, "and likewise that the releasee should peaceably enter, hold, and enjoy, the premises granted, without the lawful let or disturbance of the releasors, their heirs or assigns, or for or by any other person or persons whatsoever." That too was a case of freehold, and the Court had before them, the case of *Browning v. Wright*, and they thought and held, that the generality of the covenant for quiet enjoyment, was not restrained by the qualified covenant for good title and right to convey, in perfect consistency with the case of *Browning v. Wright*. But how could they do so? For this plain reason, because of those general words, which are also in this case, but which are not in the case of *Browning v. Wright*, though, in all other respects, it is precisely the same. But it is said, the apparent intention there was, that the releasor meant to take all the charges, &c. upon him, because he excepted what he did not mean to bear, namely, the *chief rent*, and shewed that he meant to remain liable to every thing else. But still I think it may be said, (if the report of that judgment be accurate, which no doubt it is,) that this circumstance forms no ingredient in it; it is not even hinted at, and is only mentioned by Lord *Ellenborough*, in stating the record. And I think I may venture to state, without fear of contradiction, that, if ever there existed a Judge, who luminously and perspicuously stated the grounds of a written judg-

ment, what he did, and what he did not rely upon, that noble, very learned and excellent person, was the man, and therefore, it is impossible ever to mistake his meaning, though one may happen not to come to the same conclusion. As I most perfectly coincide with that judgment, I am of opinion, that the covenant for quiet enjoyment, in this case, is not, in point of necessary construction, to be restrained in the manner contended for by the defendant, and consequently, in my view of it, that there ought to be judgment for the plaintiff.

1819.  
NIND  
v.  
MARSHALL.

Lord Chief Justice DALLAS.—The question in this case arises on the covenant for quiet enjoyment, namely, whether it is confined to the acts of the covenantor, and those claiming under him, or applies to the acts of all other persons of any description whatsoever. And in this, as in every similar case, it is a question of intention to be collected, not merely from the words of any one covenant, but by comparing all the covenants, each with the other, so that the construction be made on the entire deed, and this, without reference to the order in which the covenants are found. In the present case, the first covenant is for a good and valid lease, notwithstanding any act done by the covenantor, or by those who may claim under him, to the contrary. Next comes the covenant on which the breach is assigned, namely, the covenant for quiet enjoyment, and it is for quiet enjoyment against the covenantor, his heirs, executors, administrators, and assigns, and if it stopped here it would be clearly restrictive. But these words are added, on which the difficulty arises, “or any other person or persons whomsoever.” The clause of indemnity then follows:—It is “To keep harmless and indemnified, against all acts done by the covenantor, or those claiming under him,” drop-



1819.

NIND

v.

MARSHALL.

pling the words in the covenant for quiet enjoyment, viz. "against the acts of all persons whomsoever." Lastly comes the covenant for further assurance; and here again the words "or any other person or persons whomsoever," recur; but again limited to the covenantor and his representatives, or any person claiming under him or them, so as to be again clearly restrictive, in the sense in which I understand them. Every case of this sort must contain covenants apparently, or often really inconsistent, for it is only from such inconsistency that the case arises, and it is doing nothing towards solving the difficulty to take the words of any separate covenant; the rule is, that if, to give to words what might seem to be their meaning, if taken by themselves, would be inconsistent with the general purview of the deed as to be extracted from all the covenants, or to express it differently, as the evidence of intention may appear on the whole; so each particular covenant must be construed. With respect to the deed in question, one would naturally suppose, that in covenanting for the validity of the lease, the lease being the subject to be assigned, the covenantee would stipulate in terms of as extensive meaning as possible, if the parties so meant; but the covenant in question, is restrained to the covenantor and his heirs or assigns, but it is asked, if nothing more was meant, why in the covenant, which immediately follows, are words introduced, which, of themselves, import a great deal more? And this certainly raises the difficulty;—Are those words, because placed last, to extend the former words, or are the former special words to restrain the subsequent general words? or are the subsequent general words to be considered as extending the former restrictive words?—Are the subsequent restrictive words, into which the deed again

relapses in the covenant for indemnity, to narrow the general words in the covenant for quiet enjoyment? and what are we to say, when we find that the latter special words are again followed by the general words in the concluding covenant for further assurance, and there again restrained to acts done by them, claiming under the covenantor? As far as light is to be derived from cases, that of *Browning v. Wright* contains a reference to most of those to be found. As to the case itself, it does not seem to me to touch the present; there the covenant for title was qualified; so was the clause of warranty; equally so the stipulation for indefeasibility of estate; and lastly, such was the covenant for quiet enjoyment, nor was even the covenant for right to convey general, for it was only to convey in manner aforesaid, connecting therefore by words of reference, the individual covenant with the preceding restrictive covenants, and equally throwing light on the covenants which followed, taking all the covenants together, with or without reference to the order in which they stood. In *Gainsford v. Griffiths*, the covenant was general, that the lease was indefeasible, differing therefore from this, in which it is special and limited; and the only question appears to have been, whether the special words in the covenant for quiet enjoyment, could restrain the general words in the former covenant, which the Court held they could not. *Broughton v. Conway* does not seem to me to apply.—The covenant was, that the party had done no act to impeach the property in question, *but that* the assignee might quietly enjoy, without let of him, or of any other person, and the words "*but that*," were considered as being dilatory, and dependant on the precedent matter, and no new matter or sentence, and the ground of decision was the precise form of the particular covenant. Without dwelling on intermediate cases, which does not

1819.

NIND  
t.

MARSHALL.

1819.  
  
 NIND  
 v.  
 MARSHALL.

appear to me to be necessary, I shall now come to the case of *Howell v. Richards*, and examine how far it is similar, and in what respects it differs from the present. The covenant for title there was of a limited nature like the present, so, as to right and authority to convey; the covenant for quiet enjoyment was in the same terms as the present, and the last covenant being general in its terms, the question arose, whether it was restrained by the precedent special clauses; and thus far the two cases exactly agree. But now the difference arises, and it is this: In *Howell v. Richards*, the covenant to indemnify, following that for quiet enjoyment, was in the most comprehensive terms, with a single saving as to a chief rent, and on this, in giving the judgment of the Court, Lord *Ellenborough* greatly relied; but here the covenant for indemnity is special, and confined to acts done by the covenantor, or those claiming under him. As applied to the same subject, the special and restricting covenant follows the general one. And this makes the reasoning in *Howell v. Richards* apply the other way. Lord *Ellenborough* there said, 'The person using the general words, (which were the last words) could not forget that he had immediately before used special words of a narrower extent.' Apply this to the present case, in which special words follow the general words, and therefore, if the general words in *Howell v. Richards*, because the last words used, were to enlarge the special preceding words, the special words here, because the last used, should restrain the general; so that, if in the order in which they are found, the words last uttered by the party, be to make in any respect the distinction, the case of *Howell v. Richards*, instead of being an authority for the plaintiff, is an authority, as far as the reasoning goes, in favour of the covenant being restrictive. Nor does this observation merely attach upon what

is said in the judgment there given, but it seems to me, so to apply on the sense and reason of the thing ;—at all events in the circumstances belonging to each, the cases differ. Here the covenant for further assurance, the last in the deed, is to me clearly restrictive. The words occur, as in the covenant for quiet enjoyment, “all and every other person or persons whomsoever,” preceded by the words, “his executors and administrators;” and in a subsequent part of the same covenant, these words are explained, and qualified by the words “in trust for him or them;” that is, the covenantor or his assigns, shewing, that in the former covenant, they were made use of in the same sense. Without rejecting therefore these words, this will give a meaning consistent with all the other covenants, shewing that the covenantor meant only to covenant against his own acts, and those claiming under him. On the whole, therefore, when I find the deed begin and end with a restrictive covenant, when I find intermediate restrictive covenants, when I find in the very clause in which the supposed general covenant occurs, that it is immediately preceded by a restrictive covenant; when I farther find, that to suppose the general words were added to enlarge the restrictive words, would be inconsistent with special restraining words which immediately follow, and would give them a sense different from what they bear in a subsequent covenant :—Putting all these circumstances together, and having to assign a meaning to the general words, not merely by themselves, nor even as they follow special words, but as they themselves are in every subsequent covenant followed by restrictive words; if there were more of difficulty in this case than appears to me to belong to it, still, on the whole, I should be of opinion that the general intention is clear, and in favour of a clear intention; that is, such intention to be collected from the whole deed, I should consider that these words might even

1819.

NIND

v.

MARSHALL.

1819.  
 NIND  
 v.  
 MARSHALL.

be rejected, if necessary. But this I do not see any necessity to do, because I think "all persons whatsoever," must be construed to mean persons of the description in the other covenants, that is, persons claiming under the covenantor, or persons claiming under them; and that they are in the nature of sweeping and comprehensive words, introduced to give the largest effect to the special words, reference being had to their special nature, and as such, ranging under known rules of construction, and are to be explained and applied, as I have already stated.

Agreeing therefore, with my Brothers *Burrough* and *Richardson*, I am of opinion that the judgment must be for the defendant.

Judgment for the defendant.

Wednesday,  
 June 30.

SWAIN v. MORLAND, Esq. late sheriff of KENT.

A *fiery facias* issued at the suit of the plaintiff, on Friday 14th of November, against the goods of I. S. On Saturday the 15th, the sheriff seized and sold part of the goods,

THIS was an action of debt for money had and received by the defendant to and for the use of the plaintiff, and commenced in *Easter Term*, 1818, to which the defendant pleaded *nil debet*, whereupon issue was joined. The cause came on for trial before Lord Chief Justice *Dallas*, at the Sittings at *Guildhall*, after the last *Michaelmas Term*, when a verdict was found for the plaintiff for £409. 13s., subject to the opinion of the Court on the following case.

and the remainder, by twelve o'clock on *Monday* the 17th. After they had been delivered to the purchasers, and removed, but while the money arising from the proceeds of the sale, remained in the hands of the sheriff, namely, at six in the evening of the 17th, a writ of extent was delivered to him:—Held, that by the sale, the execution of the plaintiff was executed, and that he might recover the monies levied under such sale, from the sheriff, in an action for money had and received.

1819.  
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 SWAIN
 v.
 MORLAND.

In *August*, 1817, *John Sage* and *Thomas Pomfrett* being indebted to the plaintiff, executed a warrant of attorney for £800, with a defeasance for the payment of £400 and interest, on the 14th of *November* following. The plaintiff caused judgment to be entered up on such warrant of attorney; and, on the same day, a writ of *feri facias*, tested on the 25th of *June*, 1817, returnable in eight days of *St. Martin*, and indorsed, to levy £409. 13s. besides poundage-fees, &c., was issued upon the judgment against *Sage* and *Pomfrett*, directed and delivered to the defendant as sheriff of *Kent*. The defendant, as sheriff, granted his warrant on the above writ on the said 14th of *November*, and on the following day, being *Saturday*, the 15th, he entered and seized the goods and chattels of *Sage* and *Pomfrett*, and began to sell the same, and having, on that day, sold part of the said goods and chattels, viz. to the amount of £146. 3s. 5d. continued such sale by disposing, in like manner, of the remainder thereof on *Monday*, the 17th of the same month; and all the goods and chattels so seized and sold, were moved off the premises of *Sage* and *Pomfrett*, on the 17th of *November*, before twelve o'clock of that day, by the respective buyers thereof, who paid for the same at the time of removing the goods. Some days after such removal and payment, the defendant, as sheriff, was called upon to pay over to the plaintiff the money so levied under the writ, which he refused to do; and upon being afterwards ruled to return the writ, he made the following return, viz. "That by virtue of the writ to him directed, he did levy and receive the sum of £413. 16s. which money then remained in his hands; and further returned, that after the execution of the said writ, to-wit, on the 17th *November* then last past, His Majesty's writ of extent, tested the same day, was delivered to him against the goods and chattels, lands, debts, &c. of *Thomas Pomfrett* and one

1819.

SWAIN
v.

MORLAND.

William Sage, for the sum of £1961. 16s. 5d.; and that on the 26th of *November*, a certain other writ of extent, tested the 22d of *November*, was delivered to him, against the goods and chattels, lands, debts, &c. of *John Sage*, in the writ of *fiery facias* mentioned, for the sum of £1961. 16s. 5d., and that in obedience to the said writ of extent, he had taken inquisitions thereon, a copy whereof was to the return annexed; and the defendant further returned, that *Sage* and *Pomfrett* had not, nor had either of them, any goods or chattels in his bailiwick (save and except the goods and chattels seized by him under and by virtue of the said writs of extent), whereby he could cause to be levied the debt and damages in the writ of *fiery facias* mentioned, or any part thereof." Then followed two inquisitions taken under the extent, and referred to in the defendant's return, the first of which, after stating what effects *Pomfrett* was possessed of on the 17th of *November* and the 10th of *December* (the day of taking the inquisition), found, that by virtue of a writ of *fiery facias* issued out of the Court of *Common Pleas at Westminster*, against the goods and chattels of *Sage* and *Pomfrett*, returnable in eight days of *St. Martin*, and indorsed, "Levy £409. 16s. besides poundage-fees, &c.," the sum of £413. 7s. 6d. was, on the day and year aforesaid, and on the day of taking that inquisition, remaining in the hands of the defendant as sheriff; all which goods and chattels, effects, and sums of money, he, the sheriff, on the day of taking the inquisition, had, by virtue of the writ thereunto annexed, seized and taken into His Majesty's hands; and that *Pomfrett* had not, on the day in the said writ mentioned, nor at any time since, any lands, &c. or any goods or chattels, other than as thereinbefore mentioned, nor had *Sage*, in the said writ mentioned, any thing within his bailiwick that could be extended, seized, or appraised, The second inquisition was similar to the

first, except as to stating what effects *Sage* was possessed of on the 22d of *November*, and at the time of taking the inquisition. The money so levied by the defendant, as sheriff, under the writ of *feri facias*, was again demanded, and he again refused to pay the same to the plaintiff. The writ of extent was issued on the 17th of *November*, and tested on the same day, but not received by the sheriff until six o'clock in the evening of that day. If the Court should be of opinion that the plaintiff was entitled to maintain the action, then the verdict was to stand for the sum of £409. 13s. ; but if the Court should be of opinion that the action could not be maintained, then a nonsuit was to be entered.

The cause came on for argument on a former day in this Term, when

1819.

 SWAIN
 v.
 MORLAND.

Mr. Serjt. *Copley*, for the plaintiff, premised, that the distinction taken in cases of this description was, whether there has been any alteration of the property or not. Lord Chief Baron *Macdonald*, in the case of *Rex v. Wells* and *Allnutt* (a), said, "That the principle on which the case of *Rex v. Cotton* (b) was decided; was, that if the King's execution bore *teste* before the property was altered, it bound that property; that if the premises were just, it reached goods taken in execution, but not sold;" and he further observed, that "the case of *Cooper v. Chitty* (c), seemed decisive, as it was there laid down, that on sale by the sheriff before assignment under a commission of bankruptcy, no action can be maintained by the assignees. But if the assignment had taken place after the delivery of the writ, but before sale, an action would lie against him, and it

(a) 16 *East*, 279, n.—(b) *Parker*, 112.—(c) 1 *Burr*. 26.

1819.

 SWAIN
 v.
 MORLAND.

would be a trespass in him to sell, when the property was altered by assignment." In this case the property was altered by the sale, and the goods paid for by the buyers before the writ of extent was delivered to the sheriff, and as they were taken and sold, the sheriff held the money in trust for the plaintiff. This principle appears to be established by analogy to cases of bankruptcy; between the act of bankruptcy and the assignment of the bankrupt's effects, there is no change of property as against the Crown, but by the assignment, the property is altered, and if the writ of extent be tested after the execution of the assignment, the Crown is barred. The case of *Rex v. Wells and Allnutt* has not only been recognised but adopted by the Court of *Exchequer* in a late decision (*), and the principle respecting the alteration of property has been there fully confirmed. Here it may be said that the writ of extent issued on the same day on which part of the goods were sold, and that in law there is no fraction of a day, but the property was already transferred. Generally speaking, if two writs issue on the same day, the King's must have the priority; but here, the property was divested and sold before the Crown had taken any steps whatever, as it was sold and paid before twelve o'clock, and the writ of extent was not delivered to the sheriff until six. It is not stated that the writ was tested or issued before twelve, and when the property is transferred by sale, the money arising from such sale belongs to the party for whom the goods are sold; and the defendant has returned that he has levied a certain sum of money which still remains in his hands, and which, under the circumstances of this case, he ought to have paid over to the plaintiff.

Mr. Serjt. *Lens, contra.*—The question in this case turns on a very narrow point. If the sale had been com-

(*) Which has not yet been published.

pleted, the proceeds produced by it would have belonged to the plaintiff, and if the goods had been delivered to the buyers, there could have been no difficulty whatever; but the question is, whether or not these things have been concluded, and the defendant contends that they cannot be so considered until the money arising from the sale is actually delivered to the persons under whom such levy was made. If so, the writ of extent is in time if it intervene at any period before the entire completion of the execution before the delivery of the money to the party. The plaintiff here had never any property in the goods, but had merely a right to obtain them under a due process of law. [Lord Chief Justice *Dallas*.—This being an action for money had and received, is not the sheriff liable the moment he receives it?] In common cases, where the Crown does not intervene, it is true he ought to pay over the money to the party, but not so where a writ of extent has been issued. It is very doubtful whether this is the proper form of action to compel the sheriff to do this, for where money is levied by distress by one who has no right to distrain, an action for money had and received will not lie by him who has such right; for the money levied was never his. Here, however, there is a distinction between money received by the sheriff, as in the case of a common execution; for here it is received for the use of the person who shall be ultimately entitled to it. The Court, in the case of *Thurston v. Mills* (a), did not determine whether the writ of extent was, under the particular circumstances, entitled to priority, but only that the plaintiff could not maintain an action for money had and received against the sheriff, for the proceeds of the sale under a writ of *venditioni exponas*; but that case de-

1819.

 SWAIN
 v.
 MORLAND

(a) 16 *East*, 254.

1819.

SWAIN

v.

MORLAND.

cided, that money received by the sheriff, was in the custody of the law, and in his hands as sheriff, to be eventually disposed of, and that neither the goods nor the money were the property of the parties until they had actually been delivered over; this, therefore, is not the ordinary case of goods belonging to *A. B.*, and the money received by the sheriff for such specific goods; for the sheriff is here the officer of the Court. A plaintiff in an action has no right to the produce until the sale is completed, and the money arising therefrom delivered over. If the money arising from the sale remains in the same state as if it were paid over to the plaintiff in the execution, or the sheriff held it as trustee for him, this action might be maintainable; but if the sheriff be not such trustee, and new rights arise before his duty be discharged, the right of the Crown may attach. If the money received from the purchaser, when the property is sold, belongs to the plaintiff in the execution, there would be an end of the question:—That was the ground of the argument in the case of *Thurston v. Mills*, but there, the goods were unsold when the writ of extent came to the sheriff's hands; the question here is, what is a complete change of property? it is true that it is changed for some purposes by the sale, but the difficulty is, whether the proceeds of such sale are to be transferred to the plaintiff in the execution. The cases of *Rex v. Wells* and *Allnutt*, and *Rex v. Cotton*, have decided, that the plaintiff in execution has not a special property in the goods, but must even be considered as a perfect stranger, and as one who possesses no title whatever to them. Here, the money is in the hands of the sheriff for the mere purposes of law, and though the property of the defendant in execution is gone, and such property is altered by sale, yet it does not belong to the plaintiff in execution unless he purchases himself, and the money produced by the sale of such property cannot be his till the law vests

it in him by actual delivery; the proceeds of the sale of the goods cannot be distinguished from the goods themselves, and if he has no title to the goods, he has none to the proceeds. The plaintiff in execution has merely a general right, because the goods have been levied; but it does not follow that he is entitled to the whole of their proceeds when they have been converted into money. The only case to shew that the money produced by the sale must follow the property, is that of *Rex v. Bowdage* (a); there, an extent issued in aid, and goods were found and seized, and, upon a *venditioni exponas*, the sheriff returned that he had the money; then came an immediate extent for the Crown, which also found the goods first extended; and the Court held that the King should have them, but not if they had been delivered. An immediate extent must be preferred to an extent in aid, for the one is a prerogative writ, and supersedes the other, and there the immediate extent issued after the goods were sold, and the sheriff had the money, and he could not have paid it over without the consent of the Crown. Although here, the goods were converted into money, still, as such money had not been paid over, it might be considered as being in progress, for it not only remained in the hands of the sheriff, but he returned for answer, that it was in his possession, between the time of sale, and the issuing the writ of extent. In *Rex v. Wells* and *Allnutt*, it was held that the extent is in time if it be delivered at any moment before execution executed, though after the delivery of a *feri facias* at the suit of a subject, to the sheriff. An execution cannot fairly be said to be executed before the money raised by the sale be paid over to the plaintiff in execution. If the mo-

1819.

 SWAIN
 v.
 MORLAND.

(a) *Parker*, 282.

1819.

SWAIN

v.

MORLAND.

ney be not paid over, the sheriff might be ruled to bring it into Court, and, under the circumstances of this case, would they order him to pay it over? If not, it is quite clear that this action cannot be supported, as the goods were, in fact, never the property of the plaintiff. On the facts of this case, it is clear the plaintiff cannot recover, for in law there can be no fraction of a day, and as only part of the goods were sold on the *Saturday*, and the remaining part on the *Monday*, and although such latter sale might take place before the sheriff received the writ of extent, still the Crown is entitled to the produce of all the goods sold on that day, at whatever hour the writ might have been tested; for a writ of extent shall have a priority although it be issued at a later period of the day, if the money be not actually paid over by the sheriff to the plaintiff in execution, before such writ is received. As to the effect of an assignment in bankruptcy, so as to divest the King's right afterwards, the assignment changes the property to the assignees, who are therefore put in the place of the bankrupt. Here the rights of the purchasers are not affected, and in the cases of bankruptcy, no third persons intervene, as the sheriff does here, nor has the property been transmuted into money. In *Rex v. Earl (a)*, an extent and a commission of bankruptcy issued the same day, and it was held that the extent should have the preference, but here no fraction of a day can be received. The money, therefore, in this case, only remains in the hands of the sheriff as an officer of the Court, and not as the trustee of the plaintiff, and as the latter had not received the fruits of his execution, he is not entitled to recover in this action.

Mr. Serjt. Copley in reply, admitted, that if an action

(a) *Bunb.* 33.

for money had and received did not lie against the defendant as sheriff, that the plaintiff would not be entitled to his claim; but he insisted that that proposition could not be sustained. That it was quite clear, if a sheriff levy under a *feri facias*, he is liable to an action for money had and received at the suit of the party by whom the writ was issued, immediately on the levy being made. An action of this nature is of the most common description. The case of *Thurston v. Mills* (a) is decisive as to this point. It was there considered by the Court, that if the money had been levied under the *feri facias*, the sheriff would have been immediately liable, but he did not levy under that writ, but only under the *venditioni exponas* on which the sale took place. In *Perkinson v. Gifford* (b), it was resolved that debt would lie against the executors of the sheriff for money levied under a *feri facias*, although he had not returned the writ. That is all that is required in this case, for if the plaintiff in execution may bring an action against the sheriff on the sale of the goods, there is an end of the question. Here, the greater part of the goods had not only been sold and delivered to the purchasers, but the money was in the sheriff's hands, and the action might have been immediately brought. In *Mildmay v. Smith* (c) it is said, "the sheriff is answerable for the value of the goods after he has seized them, and is bound to sell them at all events, and is bound to the value he has returned them to be of." It is therefore clear that this action is properly brought, for when the goods were sold, the liability of the sheriff immediately attached. With respect to the distinction which has been taken between those goods which were sold on the *Satur-*

1819:

 SWAIN
 v.
 MORLAND.

(a) 18 *East*, 252.—(b) *Cro. Car.* 539.—(c) 2 *Wms. Saund.* 344, n. 3.

1819.

 SWAIN
 v.
 MORLAND.

day and those on the *Monday* following, it cannot be maintained, for at the hour of twelve on the latter day, a complete change of the property had taken place, and the goods were accordingly delivered to the buyers. The writ of extent was not received by the sheriff till six hours afterwards, and it is not stated at what hour of that day it was tested. But it is immaterial whether the writ of extent has a priority or not, because this is not a question as to the goods, but the proceeds for which they were sold. The money arising from the sale is clearly the plaintiff's property in that suit, the Crown therefore cannot interfere for what belongs to the plaintiff, as the process issued by them was against the property of the defendant in execution. But the priority of the two writs cannot apply here, for the distinction is, that the Crown shall have the preference when the writ of the subject is unexecuted. Here there was no concurrence of writs, as the property had, previously to the extent, been changed and assigned to the buyers. In the case of the *Attorney-General v. Capell* (a), it was determined that, "extents had been held good which had been actually levied by a *fiery facias*, and in the sheriff's custody, the extent coming before a bill of sale made, so as the property was not altered." But here the property had not only been paid for but delivered before the issuing of the writ of extent. With respect to the case of *Rex v. Bowdage* (b), both the processes were at the suit of the Crown, and that case had no reference to whether an action similar to the present was maintainable or not. In *Rex v. Earl* (c), which has been relied on as to there being no division of a day, there was nothing done but the taking of possession by the messenger under the commission, and it is not applicable to the present case,

(a) 2 *Shorc.* 480.—(b) *Parker*, 282.—(c) *Bunb.* 33.

as here the sheriff had not only sold the goods, but received the money for them from the different purchasers, which money was never the property of the party against whom the writ of extent had issued.

1819.

 SWAIN
 v.
 MORLAND.

Cur. adv. vult.

Lord Chief Justice DALLAS on this day delivered the judgment of the Court as follows:—

This is an action in debt, for money had and received, tried before me at the *Guildhall* Sittings, after last *Michaelmas* Term, when a verdict was found for the plaintiff, for £409. 13s. upon a case, which in substance, stated the following facts:

On the 14th of *November*, 1817, a writ of *fiery facias* issued on a judgment obtained by the plaintiff, against the goods and chattels of *John Sage* and *Thomas Pomfrett*, for the sum of £800. On the next day, *Saturday* the 15th, the sheriff entered and seized, and sold part of the goods to the amount of £146. 3s. 5d., and on *Monday* the 17th, by twelve o'clock of that day, he sold the remaining part of the goods, and after they had all been delivered and removed, but while the money remained in his hands, a writ of extent, tested the 17th of *November*, i.e. the day of such sale, was delivered to the sheriff, who therefore refused to pay over, and retained the sum so received to the plaintiff's use, to recover which, this action is brought.

It is not necessary to say any thing as to the general question, whether the King's writ of extent is to have priority over the writ of the subject, though tested or delivered on a later day, while the goods seized remain unsold in the sheriff's hands, for here the goods were sold and the money received, and therefore the question is, whether, after sale, and the goods converted into money,

1819.

 SWAIN
 v.
 MORLAND.

act or the neglect of the party in not suing out or delivering the writ of extent before. But it was said in the argument at the bar, the sale is only ended when the money is paid over, and till then, all is in progress. This is not so. The sale is complete when the party to whom the goods belonged loses his property in them, which vests in him by whom they are bought. The property cannot be in two, under adverse titles at one and the same time. The sale divesting the property out of the original owner, the money, the produce of that sale, cannot belong to him. To say, therefore, that the sale is in progress, is to give a meaning to the word which is repugnant to the nature of the thing, and to confound with the sale itself, the effect and consequence of it, namely, the final payment of the money to the party under the execution, in whom, by the sale, the property vested. It has been further said, the money, while in the hands of the sheriff, represents the goods; it is but the goods converted into money; and so it is; but to what conclusion does this lead? Not that the money belongs to the party to whom the goods belonged, for his property ceased by the sale, and therefore the money, the fruit of the sale, is the property of him to satisfy whose debt the goods were seized and sold. It represents the goods, *quoad* the purpose of the writ, namely, to make the property sold belong to the party on whose account they were commanded to be sold. Nor is the observation better founded, that till the return of the writ, the money is under the controul of the Court, for though it be so if not paid over, still it is only to answer the exigency of the writ. But further, the rule is, that the fiction of the law shall not enure to work injustice, and that time may be shewn, at least in many cases, where the justice of the case so requires, as far as time depends on the acts of the parties themselves. In the *Cricklade* case (*Petrie v. Lord Porchester*) (a), in which the

(a) *MS. 2 Tidd*, 980, 6th edit.

question was, whether the priority of one judgment before another could be averred, where it was admitted in the record, that both judgments were given on the same day; and it was determined that it could not. But Lord *Mansfield* took the distinction between a judgment, which is the act of the Court, and the act of the party, such as the commencement of the suit. And in *Pugh v. Robinson*, this distinction was recognized by Mr. Justice *Buller*, who said (a), "The delivery of the declaration is not a judicial proceeding, but the act of the party." Here, then, the delivery of the writ of extent was the act of the party, as the delivery of the declaration was in *Pugh v. Robinson*; and this case expressly states the delivery to have been after the sale.

1819.

 SWAIN
 v.
 MORLAND.

Narrowing, therefore, our decision to the particular point, we think, that by the sale, the execution was executed, and there being no fact stated, from which it appears that the *fiat* for the extent was anterior to the sale, we cannot presume such fact, or suffer a fiction to operate against the justice of this case.

One point only remains to be observed upon, and very shortly. Supposing the plaintiff entitled to the money, still it has been argued that this action for money had and received will not lie. And the case of *Thurston v. Mills* (b) has been referred to; but that case was wholly different from the present. The money, therefore, in this case, is not retained under any authority of the Court. It is unnecessary to say what the Court would have done if the sheriff had made any special application; for he has made none. On this, therefore, we give no opinion. But in this respect it resembles the case of *Dale v. Birch* (c), in which Lord *Ellenborough* held, that after a

(a) 1 T. R. 116.—(b) 16 East, 254.—(c) 3 Camp. 347.

1819.
~
SWAIN
v.
MORLAND.

return to a *feri facias*, the sheriff was liable to an action for money had and received, *without any demand of payment*, and that, though under the facts the action appeared to be vexatious; and his Lordship was of opinion that the Court would have staid the action on an application being made, yet, there having been none, he held, that upon the sheriff's return, the money levied was money had and received to the plaintiff's use, and he had a right to bring an action to recover it, without any previous demand of payment.

I mention this case, as applying only to the circumstance of no application being made on the part of the sheriff for the return. I am aware, that was merely the common-return, and not stating on the face of it any conflicting claims as the return does here.

But, on the general ground, that in point of law, money had and received by any person, is money had and received to the use of the party legally entitled, and that the party so entitled is the plaintiff in this action, to the extent of the sum levied under his writ of execution executed, and that such sum remained in the hands of the sheriff at the time of the action brought, we think the plaintiff is entitled to recover.

Judgment for the plaintiff accordingly.

1819.

Wednesday,
June 30th.

LOWE v. ROBINS.

MR. Serjt. *Onslow*, on a former day in this Term, had obtained a rule *nisi*, that the judgment which had been obtained by the plaintiff, on a writ of *scire facias* in this cause, and the subsequent proceedings thereon, might be set aside for irregularity, and that the defendant might now be allowed to plead to the *scire facias*. He founded his motion on affidavits which stated, that in *Trinity Term*, 1808, the plaintiff obtained a judgment in this Court, against the defendant, for £105. 19s. and costs, which was signed as of that term. That he took no further step till last *Hilary Vacation*, which was more than ten years from the time judgment was signed, when he obtained a writ of *scire facias quare executionem non*, directed to the sheriffs of *London*, to which they returned *nihil*. That although the plaintiff knew that the defendant was then residing in *Serjeant's Inn, Fleet Street*, no notice was given to him, either by the sheriffs, or any other person whatever, that such writ had issued. The irregularity complained of was, *first*, that the plaintiff had obtained the signature of a Serjeant at law, to a motion paper for issuing the *scire facias* out of term, instead of making that motion in Court, which was necessary, after ten years had elapsed; and *secondly*, that although the plaintiff knew where the defendant resided, he had not given him either personal or any other notice of the proceedings, neither had he notice from the sheriffs who had returned *nihil*. The Learned Serjeant relied on the case of *Bagnall v. Gray (a)* to shew that the defendant was entitled to a per-

The plaintiff, in vacation, obtained the signature of a Serjeant, to a motion paper to issue a writ of *scire facias* against the defendant, on a judgment more than ten years old. To this writ the sheriff returned *nihil*, and the defendant had no personal or other notice of the writ's having issued, although he resided in the sheriff's bailiwick: after the return, the plaintiff signed judgment:—Held, that such judgment was irregular, as the writ should have been issued on a motion to the Court in term time, and the defendant should have had personal notice thereof.

(a) 2 Sir W. Bl. 1140.

1819.

LOWE

v.

ROBINS.

sonal notice, and that therefore the issuing of the writ was a surprise upon him.

Mr. Serjt. *Bosanquet* afterwards shewed cause.—First, as to the surprise, he observed that the original judgment was signed on a *cognovit* given by the defendant, in 1808; that three letters had lately been written to him; the first of which was written on the 13th of *April* last, informing him, that if the judgment were not satisfied, the *scire facias* would issue; that before the sheriff's return, a second letter was sent to him, saying, that the *scire facias* was lodged with them; and a third letter was written on the 20th of the same month, informing him that judgment had been signed on the *scire facias*; that this last letter was sent to the defendant's residence, and answered by one of his clerks; here, therefore, the defendant had every thing but actual personal notice. As to the irregularity, although the original judgment be of more than ten years standing, yet in this Court the execution issues under a Serjeant's signature, and need not be by motion in Court, although such motion is requisite in the Court of *King's Bench*; but if the practice of this Court be otherwise, the want of such a motion cannot be taken advantage of by this rule, for it is a rule to set aside the judgment, and not the *scire facias* itself; therefore, whether the *scire facias* be regular or not, is beside the present question, but the defendant has appeared to the *scire facias*, and asked for time to plead; there is no ground therefore to set aside the writ, such a motion can only be necessary where the proceedings are against a new party as personal representatives, and not where the writ issues against the defendant himself. It was never considered necessary to give the defendant personal notice, till the case of *Bagnall v. Gray*, but that case has altered the antecedently established practice, by which no affidavit of

such notice was required. But in that case the executor of the plaintiff had leave to sue out the *scire facias*, and it therefore does not apply to cases where the original parties are alive. In the case of *Coysgarne v. Fly (a)*, the same rule was adopted as in *Bagnall v. Gray*, where an administrator *cum testamento annexo*, had leave to sue out a *scire facias*; and it appears that the Court there acted according to a precedent said to have been settled about nine years before, which was, no doubt, that of *Yarker v. Reynoldson*, referred to in the former case. [Mr. Justice Burroughs.—How can a *scire facias* be available, unless the party have knowledge of its having issued?] If it be not ten years old, no personal service or notice is required. In this Court it is a rule, that if a *scire facias* issue upon a judgment for debt and damages, against the defendant himself, who was party and privy to the judgment, and the sheriff return *nihil*, and the defendant make default, there shall be judgment against him without awarding a second *scire facias*. *Anonymous (b)*, *Barrett v. Cleydon (c)*, where the distinction is taken between the original parties and their personal representatives.

1819.

 LOWE
 v.
 ROBINS.

Mr. Serjt. Onslow, in support of the rule.—Although one *nihil* may be sufficient, without a second *scire facias* being awarded; still the signature of a Serjeant out of Court, and in vacation, is wholly contrary to the practice of this Court, when the original judgment has been obtained more than ten years. The rule laid down in *Salheld*, is corroborative of the case of *Bagnall v. Gray*,

(a) 2 Sir W. Bl. 995.—(b) 2 Salk. 509.—(c) Dyer, 168. (a.)

1819.
 ~~~~~  
 LOWE  
 v.  
 ROBINS.

where it was stated, that execution was not to issue as formerly, on the return of two *nihil*, but either on a return of *scire facias*, or an affidavit of *personal notice to the defendant*, and although it has been said, that the application for the *scire facias* there, was made by an executor, yet it does not appear that the precedent by which that case was governed, was founded on an application by a personal representative.

*Cur. adv. vult.*

Lord Chief Justice DALLAS, on this day delivered the judgment of the Court as follows:

This case comes before the Court, on a motion made on behalf of the defendant, calling on the plaintiff to shew cause why the judgment obtained on the writ of *scire facias* issued in this cause, and the subsequent proceedings thereon, should not be set aside.

The facts of the case appear by the affidavits, to be these. In *Trinity Term*, in the 48th year of the present King, the plaintiff obtained a judgment in this Court against the defendant for £105. 19s. and costs. The plaintiff took no farther step in the cause, till after the expiration of ten years from the time of signing the judgment. After this, a few days before *Easter Term* last, the plaintiff obtained the signature of a Serjeant at law, to a motion paper for the issuing a *scire facias*, calling on the defendant to shew cause why execution should not issue against him; this was contrary to the well known practice of the Court, for it is settled, that after ten years, such a motion paper can only be obtained in term time. By this irregular step, the writ of *scire facias* was issued in *Hilary* vacation, about the 7th *April* last, returnable the first return day of *Easter Term* last.

The writ was directed to the sheriffs of *London*; who returned *nihil*, although the defendant at the

time was resident in *Serjeant's Inn*, in *London*. It is sworn and not denied, that the defendant had no notice from the sheriffs, or any one on their behalf, of this writ, and there is no affidavit that he had, from any one, personal notice of it, which, according to the case of *Coysgarne v. Fly (a)*, is said to be necessary.

We think, that where the defendant resides within the bailiwick of the sheriff to whom the writ is directed, he ought to have notice by summons from the sheriff, and that in such case, a return of *nihil*, stating that he has nothing in his bailiwick whereby he can be summoned, cannot be supported.—After the return of the writ on the 5th *May*, the plaintiff signed judgment. If the defendant had moved to set aside the *scire facias*, as well as the judgment, the Court must have made the rule absolute, because it is most clearly settled, that after ten years, a motion to revive a judgment can only be made in term time. We think, however, that the rule the plaintiff has obtained, must be made absolute for setting aside the judgment. The judgment was signed on the 5th of *May*. It was urged at the bar, that the irregularity was waived by the defendant's appearance to the writ of *scire facias*. This appearance was not entered till the 11th of *May*, the plaintiff will have the benefit of this appearance, for it is to the writ of *scire facias*, and he will be enabled to deliver his declaration, and proceed regularly in the cause. But we think it no waiver of the objection to the judgment; for, strictly speaking, the *scire facias* is the commencement of a new suit, and the defendant did right to enter an appearance, before he made the motion.

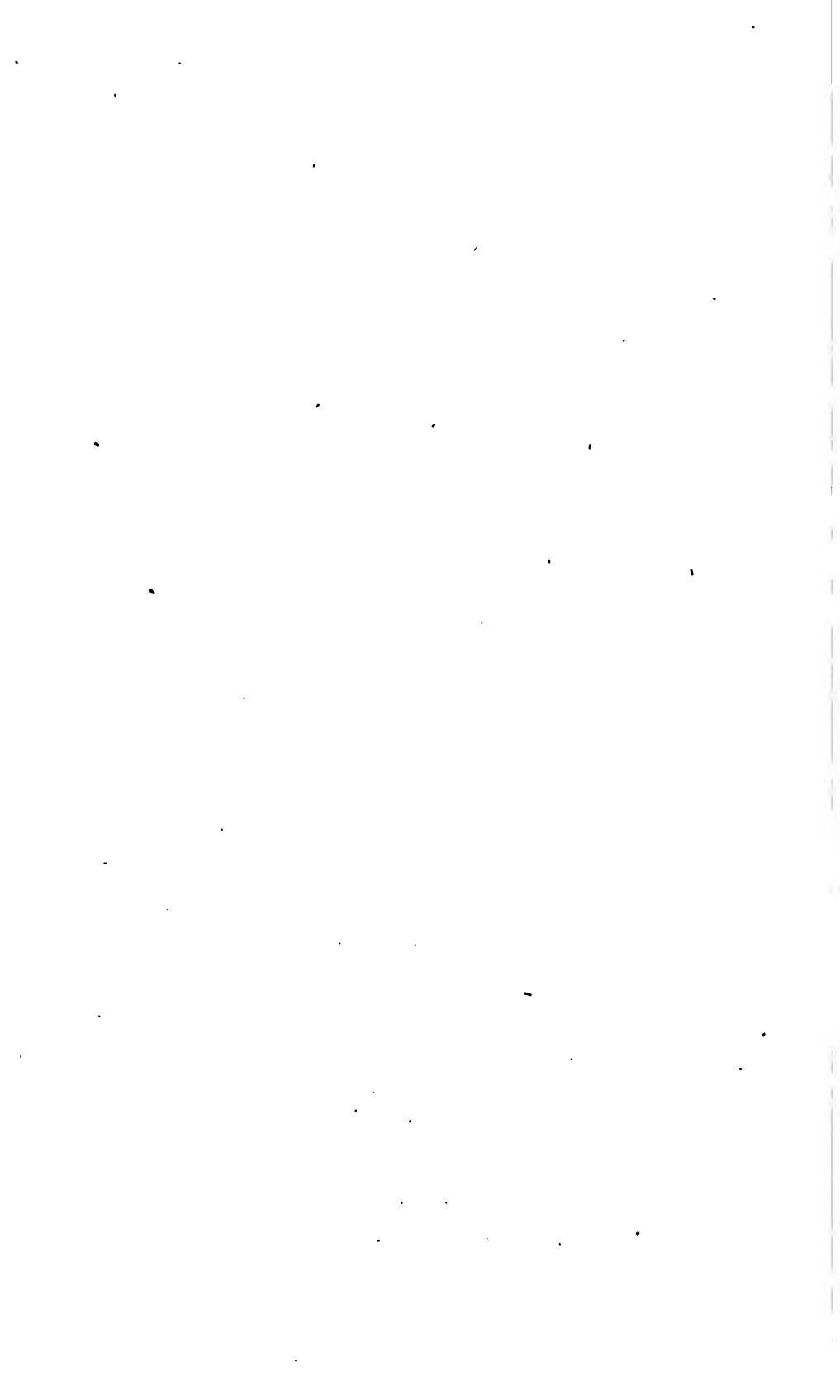
Rule absolute.

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(a) 2 *Sir W. Bl.* 995.

1819.  
  
 LOWE  
 v.  
 ROBINS.





AN  
INDEX  
TO THE  
PRINCIPAL MATTERS.

**ABANDONMENT.**

See INSURANCE, 1.

**ACT OF PARLIAMENT.**

See STATUTES.

**ACTION ON THE CASE.**

See EXCISE, 1.

SHERIFF, 1. 3.

**ADMINISTRATOR.**

See EXECUTOR, 1.

**ADMISSION OF DEBT.**

See EXECUTOR, 1.

**AFFIDAVIT.**

See AMENDMENT, 1.

ATTACHMENT, 1.

AWARD, 1.

EJECTMENT, 3.

FINE, 1. 5.

PRACTICE, 3. 15.

WARRANT OF ATTORNEY, 1.

1. If a declaration against a prisoner in custody be delivered on the last day of the term in which the writ is returnable, the affidavit of the delivery need not be filed till twenty days after the expiration of the following term.  
*Wood v. Stephens, E. 59 G. 3.*

236

2. An affidavit, stating that the defendant had been discharged under an Insolvent Debtor's Act, cannot be sworn before his own attorney in the cause. *Jenkins v. Mason, E. 59 G. 3. Page 325*

**AFFIDAVIT TO HOLD TO BAIL.**

See PRACTICE, 9.

**AGREEMENT.**

See EJECTMENT, 1.

FRAUDS, STATUTE OF, 1.  
STAMPS, 1.

**AMENDMENT.**

See BAIL, 2.

Of Fines, See *tit.* FINE.

Of Recoveries, See *tit.* RECOVERY.

1. If the month be omitted in the jurat of an affidavit of the delivery of a declaration against a prisoner in custody, it is defective, and cannot be amended.  
*Wood v. Stephens, E. 59 G. 3.*

236

**APPEARANCE.**

See PRACTICE, 3. 8.

**ARBITRATION.**

See AWARD.

## ARBITRATOR.

See AWARD.

## ARMY CLOTHIER.

See PARLIAMENT, 1.

## ARREST.

See BAIL.

COSTS, 6. 8. 9.

PRACTICE, 5. 12.

1. A defendant cannot be held to bail a second time for the same cause of action, if the plaintiff *non pros* or discontinue the former, unless such plaintiff shew that he did so on account of a mistake or misconception, and that the second arrest was not vexatious. *Archer v. Champneys*, T. 59 G. 3, Page 607

## ASSIGNEE.

See BANKRUPT.

COVENANT, 1. 3. 4.

PLEADING, 1.

## ASSUMPSIT.

See BARON AND FEME, 1.

MONEY HAD AND RECEIVED.

PLEADING, 4.

## ATTACHMENT.

See WITNESS, 2.

1. The Court will not grant an attachment against a witness for disobedience to a subpoena, unless the affidavit state that he was duly called at the trial. *Malcolm v. Ray*, E. 59 G. 3. 222

## ATTORNEY.

See AFFIDAVIT, 2.

BAIL, 3.

COSTS, 1.

LIBEL, 1.

PRACTICE, 14. 15.

1. Where a country attorney continued to practice two years after his agent had negligently

suffered his certificate to expire, although remittances were made by such attorney for the purpose of renewing it; the Court will re-admit him on payment of his arrears, without a term's notice. *Ex parte Christian*, T. 59 G. 3.

Page 578

## AUCTION.

See EXECUTION, 1.

## AVOWRY.

See REPLEVIN, 1.

## AWARD.

See COSTS, 7. 9.

PRACTICE, 4.

VARIANCE, 4.

1. If the terms of an award be clear upon the face of it, the Court will not admit an affidavit of one of the arbitrators to explain their intention. *Gordon v. Mitchell*, E. 59 G. 3. 241
2. Six partners entered into two bonds of submission to arbitration; in the one, three gave a joint and several bond to the other three, conditioned for the due performance of the award, and the latter gave a similar bond to the three former. The arbitrator awarded that one of the three former should pay a certain sum to one of his co-obligors. In an action of debt on the award brought by the one against the other alone. *Held*: that he might recover the sum awarded. *Winter v. White*, T. 59 G. 3. 674

## BAIL.

See ARREST.

1. If a defendant surrender in discharge of his bail in the vacation, after final judgment, the term in which such judgment is

signed, is one of the two terms in which the plaintiff must charge him in execution. *Neill v. Lovell*, H. 59 G. 3. Page 8

2. If bail be put in, in the county palatine of *Lancaster*, where the defendant is arrested upon a *testatum capias* from *London*; and it appears on the face of the bail-piece that they had been put in at *Lancaster*: *Held*: that the bail-piece was wrong, as it should have stated, that the *testatum* issued from *London* into the county palatine; but the Court gave time for a proper bail-piece to be transmitted, and directed that the same bail might justify. *Longworth v. Healy*; *Lee v. Same*, H. 59 G. 3. 76

3. If added bail be excepted to, on the ground that the original bail were attorneys' clerks, the Court will give time to put in and justify fresh bail. *Hodges v. Meek*, E. 59 G. 3. 240

4. If a defendant be in the criminal custody of the Court of *King's Bench* for a conspiracy, this Court will not take him out of such custody, in order to surrender him in discharge of his bail. *Bennett v. Kinnear*; *Currie v. The same*, E. 59 G. 3. 259

5. Bail about to justify by affidavit were described in the notice, "as of the town and county of the town of *Nottingham*": *Held*: too general, and that the street in which they resided should have been inserted in the notice; and that new bail could not be substituted, as the former were brought up under a rule, and not a notice. *Anonymous*, E. 59 G. 3. 318

## BAIL BOND.

1. A declaration on a bail-bond, in setting out the condition, stated,

that if the defendant should appear to answer the plaintiff, "according to the custom of his Majesty's Court of Common Bench here," the obligation should be void. On the production of the bond, the former words were omitted:—*Held*: that this was no variance, as it was only necessary to set out the condition according to its legal effect. *Bonfellow v. Steward*, E. 59 G. 3.

Page 214

## BAIL PIECE.

See BAIL, 2.

PRACTICE, 9.

## BANKER.

See MONEY HAD AND RECEIVED.

## BANKRUPT.

See COSTS, 10.

FELONY, 1.

INDICTMENT, 1.

1. Two traders in partnership, left their shop, and told their shopman that they were going out to endeavour to get some bills of exchange discounted, and directed him to say that they were not in the way, or to make some excuse for them in case a creditor should call. On that and on the following day a creditor called, when they were both at home, and desired to see either the one or the other of them, when the shopman denied them, without being authorized by them so to do:—*Held*: that the Jury were warranted in concluding that they absented themselves with an intent to delay their creditors. *Capper v. Des Anges*, H. 59 G. 3. 4

2. If a bankrupt be described in a commission as a dealer in cattle only; evidence cannot be adduced to prove that he was a dealer in hops. *Hale v. Small*, *H. 59 G. 3.* Page 58
3. *Quare*, Whether a farmer, who deals largely in sheep, and sells some at fairs from his own farm, and makes purchases and sells at the same fair, at a profit and loss; and buys and sells others that had never been at any fair, be a trader within the *5 G. 2. c. 30. s. 40?* 58
4. An action of trespass *quare clausum fregit* is maintainable by a tenant from year to year, who had become bankrupt after the committing the trespass, and before the commencement of the suit; and the right of such action does not pass to the assignees by the assignment, unless they interfere; as the bankrupt may sue as a trustee for, and has a good title against all persons but them. *Clark v. Calvert*, *H. 59 G. 3.* 96
5. The issuing a commission of bankruptcy is of itself sufficient notice to all the world of a prior act of bankruptcy having been committed; and the want of actual or personal knowledge of the issuing of such commission will not protect a payment made within the stat. *1 Jac. 1. c. 15. s. 14.* *Brooks v. Sowerby*, *H. 59 G. 3.* 157
6. An acknowledgment by a person that he was in partnership with another as a trader, who afterwards became bankrupt, is sufficient to constitute a trading within the meaning of the bankrupt laws; although no acts of buying or selling were proved to have taken place during the partnership. *Parker v. Barker*, *E. 59 G. 3.* 226

7. In an action of trover brought by the assignees of a bankrupt for a rick of bark, and of which the bankrupt was the reputed owner, a witness may be asked, what was the reputation of the neighbourhood to whom the rick belonged at the time of the bankruptcy, if it appear that the bankrupt had exercised repeated acts of ownership over it, previous to that time. *Oliver v. Bartlett*, *T. 59 G. 3.* Page 592
8. An uncertificated bankrupt cannot maintain an action of trespass against subsequent creditors, for breaking open his house, and seizing his after-acquired property, although his assignees do not ratify the seizure, and although they were unknown to the defendants until after the commencement of the action. *Hull v. Pickersgill*, *T. 59 G. 3.* 612
9. A bankrupt having surrendered to his commission, refused to answer certain questions put to him by the commissioners relative to the disposition of some of his property:—*Held*: that this did not amount to felony within *5 Geo. 2. c. 30. s. 1.* *The King v. Page*, *T. 59 G. 3.* 656
10. A person lay in prison two months for debt, subsequently to a criminal process which had been discharged:—*Held*: that this constituted an act of bankruptcy, though it did not appear that he had personal notice of his discharge. 666

## BARON AND FEME.

See FINE, 6.

PRACTICE, 3.

1. An action of *assumpsit* for the use and occupation of a house, is not maintainable against the

## BILLS OF EXCHANGE.

husband alone, if his wife held under a yearly tenancy before marriage, the rent being payable half yearly, where part of such rent was due from the wife *dam sola*, and the remainder accrued after the coverture. *Richardson v. Hall*, *E. 59 G. 3.*

Page 307

## BASTARD.

See STAMPS, 1.

## BASTARDY BOND.

By the 54th Geo. 3. c. 170. s. 8. an action on a bond to indemnify a parish against the expences of a bastard child, must be brought in the names of the overseers for the time being, and not of those to whom the bond was given. *Addey v. Woolley*, *H. 59 G. 3.* 21

## BILLS OF EXCHANGE AND PROMISSORY NOTES.

See COSTS, 8.

MONEY HAD AND RECEIVED, 1.

STAMPS, 1.

VARIANCE, 2.

1. If in a joint and several note, payable by instalments, the day on which one of the instalments becomes payable, be mis-stated in the declaration, it is a fatal variance, and if the defendant sign such note as a surety for the other maker, the plaintiff cannot resort to the common money counts. *Wells v. Girling*, *H. 59 G. 3.* 79
2. If a bill of exchange be drawn, payable to the order of the drawer, at a particular place, without being addressed to any person, and the defendant afterwards accept it:—*Held*: that such bill need not have been directed to, or have described the

## COMPOSITION. 767

defendant by name; and that by such acceptance, he adopted the place of payment. *Gray v. Milner*, *H. 59 G. 3.* Page 90

## BLACK ACT.

See HUNDRED, 1.

## BOND.

See BASTARDY BOND.

PRACTICE, 13.

VARIANCE, 4.

## BURIAL.

See FORGERY, 1.

## CAPIAS AD RESPONDENDUM.

See PRACTICE, 7.

## CERTIFICATE.

See INSOLVENT, 2. 3.

## CHACE.

See TRIAL AT BAR, 1.

## CHECQUE.

See MONEY HAD AND RECEIVED.

## CHESTER.

See PRACTICE, 7.

## CODICIL.

See WILL.

## COGNIZANCE.

See LABOURERS.

REPLEVIN, 2. 3.

## COMMISSION OF BANKRUPT.

See BANKRUPT.

## COMPOSITION.

See EXECUTION, 1.

TITHES, 1.

## CONSENT RULE.

See EJECTMENT, 1.

## CONSPIRACY.

See BAIL, 4.

## COSTS.

1. The Court will not require the attendance of a third person, before the prothonotary, in the taxation of a bill of costs, which had been referred to him, to assist a Master in Chancery, to whom the reference had been previously given. *Protheroe v. Thomas*, H. 59 G. 3. Page 3
2. Security for costs is not required from a foreigner during his absence from this country, on board his own ship, if he reside here part of the year. *Durell v. Mattheson*, H. 59 G. 3. 33
3. Security for costs will not be required from an English officer serving in *South America*.—*O'Langhla v. Macdonald*, H. 59 G. 3. 77
4. Nor from a foreigner during the time he is resident in this country. *Anonymous*, H. 59 G. 3. 78
5. But if a plaintiff be resident abroad, the Court will require him to give security for costs, although he sue in the capacity of executor. *Chevalier v. Finnis*, T. 59 G. 3. 602
6. A defendant cannot apply for costs under the 43 Geo. 3. c. 46. s. 3. if he pays a smaller sum into Court than that for which he was arrested, and the plaintiff takes it out and proceeds no further in the action. *Butler v. Brown*, E. 59 G. 3. 327
7. In trespass *quare clausum fregit*

the defendant pleaded, 1st, not guilty; 2dly, a justification of a right of way; and lastly, *liberum tenementum*. The plaintiff joined issue on the first, and traversed the second and last pleas: and new assigned as to the second. An arbitrator found for the plaintiff generally, on the first and last pleas, and also on the new assignment, with one shilling damages: and for the defendant on the second plea:—*Held*, that the plaintiff was entitled to his full costs, deducting the defendant's costs on the issue found for him, although the witnesses of the latter were detained at the assizes, by the plaintiff's having withdrawn his record, for the purpose of amending it. *Trotman v. Holder*, E. 59 G. 3. Page 555

8. If a defendant be arrested for £15, for goods sold, and be indebted to the plaintiff, in the sum of £14 only, on a promissory note, payable by instalments, the Court will not allow the defendant his costs pursuant to 43 Geo. 3. c. 46. as he might have been arrested on the note. *Pincher v. Brown*, T. 59 G. 3. 590
9. If a defendant be arrested for £100, and the cause be afterwards referred to an arbitrator, who finds that £20 only are due to the plaintiff:—*Held*: that the defendant is not entitled to his costs, under 43 Geo. 3. c. 46. s. 3. on the ground of an arrest, without probable cause. *Pain v. Acton*, T. 59 G. 3. 605
10. If the plaintiffs as assignees of a bankrupt, prove the petitioning creditor's debt, trading, and act of bankruptcy at the trial, pursuant to notice by the defend-

## COVENANT.

ant so to do, and are afterwards nonsuited, they are not entitled to costs under 49 Geo. 3. c. 121. s. 10. as that clause relates only to cases where they obtain a verdict. *Atkins v. Seward*, T. 59 G. 3. Page 601

## COUNTY PALATINE.

See BAIL, 2.  
PRACTICE, 7.

## COVENANT.

See PLEADING, 1. 2.

1. A. demises by lease to B., who assigns his interest to C., and C. to D. B. covenants for quiet enjoyment with C. and his assigns:—*Held*: that D. might maintain an action of covenant against B., on being ejected by A. for a forfeiture made by B. before the assignment to C. *Lewis v. Campbell*, H. 59 G. 3. 35
2. In a declaration of covenant brought by a sheriff against a surety for one of his officers, who had not arrested a person under his warrant, it is necessary to aver that the warrant was delivered by the sheriff, to such officer; and it seems that such warrant should have been directed to him. *Des Anges v. Priestly*, E. 59 G. 3. 246
3. Covenant for non-payment of rent, lies against an assignee of a lease, to whom an assignment is made by way of mortgage security, although he has never entered or taken actual possession. *Williams v. Bosanquet*, E. 59 G. 3. 500
4. The assignor of a lease, covenanted, that for and notwithstanding any act or thing by him done, the lease was valid; and

## DEED.

769

further, that it should be lawful for the assignee at all times during the term, quietly to enjoy, without the lawful let or interruption of the assignor, his executors, administrators, or assigns, or any of them, or any other person or persons whomsoever, claiming any estate or right in the premises, and that, clearly discharged by the assignor, his heirs, executors, or administrators, from all former incumbrances made or suffered by him, or by their or either of their acts or privity; then followed a covenant for further assurance by the assignor, his executors and administrators, and all persons whomsoever, claiming under him: *Held*: that the general words in the covenant for quiet enjoyment, were restrained by the restrictive words in the covenants for title and further assurance, which preceded and followed it; and therefore that such covenant was confined to the acts of the covenantor and those claiming under him. *Nind v. Marshall*, T. 59 G. 3. Page 703

## DEBT.

See AWARD, 2.

## DEBTOR AND CREDITOR.

See EXECUTION, 1.  
INSOLVENT DEBTOR.

## DECLARATION.

See AFFIDAVIT, 1.  
EJECTMENT, 3. 4.  
PRACTICE, 6.  
REPLEVIN, 3.

## DEED.

See COVENANT.  
PRACTICE, 15.



## DEFAMATION.

See LIBEL, 1.

## DEVISE.

1. A. by will, devised all his real estates, save and except certain copyhold estates therein mentioned, in trust for his eldest son, with remainder, to preserve contingent remainders, with remainder to the male issue of his son in tail male, with remainder over; and afterwards made a codicil, whereby, after reciting, that by the death of his brother he had become entitled for life to certain estates mentioned in the will of J. S. he revoked the limitation in his will, so far as it related to his estates in favour of his son, and declared that a proviso, contained in his will for that purpose, should be extended so as to comprehend the estates limited by the will of his brother, as well as those limited by the will of J. S. and from preventing the estates mentioned in his will from going with those limited by the will of his brother, as was provided in his will as to the estates limited by the will of J. S.:—  
*Held*, that such codicil did not amount to a republication of his will; neither did it amount to a devise by implication, or a confirmation of a devise of lands contained in his brother's will.  
*Parker v. Biscoe*, H. 59 G. 3.

Page 24

2. Devise "to my brother I. G. of my freehold estate, consisting of thirty acres of land, more or less, with the dwelling-house and all erections on the said farm, situate at *Sudbury Harrow*, in the county of *Middlesex*, now in

## EJECTMENT.

the occupation of I. G." passes an estate in fee-simple. *Gardner v. Harding*, T. 59 G. 3.

Page 565

## DISTRESS.

See EJECTMENT, 2.  
 LABOURERS, 1.  
 POWER, 2.  
 REPLEVIN, 1. 2. 3.

1. Trees growing in a nursery-man's ground, who was a yearly tenant to the plaintiff, and removable by such tenant from time to time, are not distrainable for rent, under the 11 Geo. 2. c. 19. s. 8.  
*Clark v. Calvert*, H. 59 G. 3. 96

## DISTRINGAS.

See PRACTICE, 3.

## EJECTMENT.

See POWER, 1.

1. A consent rule in ejectment for admitting the landlord to defend, need not set out the christian and surname of the lessor of the plaintiff. *Doe, d. Spencer v. Read*, H. 59 G. 3. 98
2. An action of ejectment is maintainable by one of two tenants in common, who had agreed to divide their property, if after such agreement, the defendant, who held under both as occupier, pay rent under a distress to such co-tenant alone; and it is no defence to such action that the deeds of partition between the co-tenants had not been executed. *Doe, d. Pitcher v. Mitchell*, E. 59 G. 3. 229
3. If a tenant in possession leave this country, and reside abroad, for the purpose of avoiding his creditors, and the premises be

charged with an annuity to the lessor of the plaintiff, to whom a right was reserved to enter, receive the rents, and sell;—judgment cannot be obtained against the casual ejector, on an affidavit that a declaration was duly served on the premises, and a copy thereof affixed to the outer door; nor can the service of the declaration on the solicitor of such tenant be deemed good, unless he resided abroad for the express purpose of avoiding such service. *Roe, d. Fenwick v. Doe*, T. 59 G. 3.

Page 576

4. Service of declaration in ejectment, on one of the tenants in possession, with another service on that tenant for the other, and an explanation given, is not good. *Doe, d. Elwood v. Roe*, T. 59 G. 3.

578

### ERROR.

See EVIDENCE, 1.  
SHERIFF, 1.

1. In an action against the sheriff for returning *nulla bona* to a *fiery facias*, which had been lodged with him at seven o'clock in the evening to be levied, and no writ of error had been allowed at half-past six on the evening of that day, but it appeared that the allowance was made within the day. *Held*: that such allowance operated as a *supersedeas*, as it might be made at any time before the day had expired. *Cleg-horn v. Des Anges*, H. 59 G. 3.

83

### ESTATE.

See DEVISE.

VOL. III.

### EVIDENCE.

See BANKRUPT, 1. 2.  
EXECUTOR, 1.  
INSOLVENT DEBTOR, 1.  
LIBEL, 1.  
POWER, 2.  
TITHES, 1.

1. *Quære*, Whether in order to prove the allowance of a writ of error, it be necessary to produce the original writ and allowance, or an examined copy thereof, or whether it be incumbent on the party to prove the service of such writ? *Cleg-horn v. Des Anges*, H. 59 G. 3. Page 83
2. A paper purporting to be a copy of the original discharge of an insolvent, signed by the clerk of the proper officer of the Insolvent Debtor's Court, with the impression of the seal affixed to it, is admissible in evidence to prove such discharge, without the production of the certificate thereof, or proof of its being an examined or attested copy. *Carpenter v. White*, E. 59 G. 3. 231
3. Notice was given to the defendants, as executors, to produce the probate of their testator's will at the trial, which they refused.—*Held*: that a document purporting to be the original will, and produced by an officer of the Ecclesiastical Court of *Chester*, under the seal of that Court, was admissible as secondary evidence, to shew that their testator had acknowledged therein that he had received money in his life-time for the use of the plaintiff. *Gorton v. Dyson*, T. 59 G. 3. 558

## EXCISE.

1. The plaintiff purchased a quantity of wines, for which he paid the duties; and it was accordingly removed to his house. He afterwards disposed of part of it to a friend, and employed the defendant to convey it, who promised to obtain a permit for that purpose. The defendant's servant changed the wine during its transfer. *Held*: that the plaintiff was entitled to recover, although the defence relied on was, that the removal took place contrary to the excise laws.

*Quere*, Whether a private individual having sold wine to a third person, for which he had paid the duties, and which constituted part of his stock, can remove such wine without a licence for that purpose?

*Quere also*, Whether such individual can remove wine, so sold, under the 26 Geo. 3. c. 59. s. 33. although he might have obtained a permit for so doing? *Toussaint v. Darlam*, E. 59 G. 3. Page 217

## EXECUTION.

See BAIL, 1.

## EXTENT.

PRACTICE, 14.

1. By the terms of a trust-deed for the benefit of creditors, the trustees were empowered to permit the insolvent to have the use of such part of his effects as they might think fit, until the debts due to him were collected; part of his property was sold by public auction, and described as the property of the insolvent removing from A. to B.:—*Held*: that such sale was sufficient notice of a change of property in the goods, and that the insolvent's keeping

## EXTENT.

possession of the remainder at B. for twelve months after the sale; was within the terms of the deed. *Woodham v. Baldock*, H. 59 G. 3. Page 11

## EXECUTOR.

See EVIDENCE, 3.

REPLEVIN, 3.

1. In an action against an administrator who pleads *plene administravit prater*, £367, and gives in evidence an inventory in the Ecclesiastical Court, in which he stated that £232, part of the whole sum, was the amount of certain debts due to the deceased, supposed to be recoverable:—*Held*: that such debts might be considered as sperate debts. *Young v. Cordery*, H. 59 G. 3. 66
2. If a plaintiff be resident abroad, the Court will require him to give security for costs, although he sue in the capacity of executor. *Chevalier v. Finnis*, T. 59 G. 3. 602

## EXONERETUR.

See PRACTICE, 9.

## EXTENT.

1. A *fiery facias* issued at the suit of the plaintiff, on Friday 14th of November, against the goods of I. S. On Saturday the 15th, the sheriff seized and sold part of the goods, and the remainder by twelve o'clock on Monday the 17th. After they had been delivered to the purchasers, and removed; but while the money arising from the proceeds of the sale remained in the hands of the sheriff, namely, at six in the evening of the 17th, a writ of ex-

tent was delivered to him. *Held*: that by the sale the execution of the plaintiff was executed, and that he might recover the monies levied under such sale, from the sheriff, in an action for money had and received. *Swain v. Morland*, T. 59 G. 3. Page 740

## FELONY.

See FORGERY, 1.  
INDICTMENT, 1.

1. A bankrupt having surrendered to his commission, refused to answer certain questions put to him by the commissioners relative to the disposition of some of his property:—*Held*, that this did not amount to felony within 5 G. 2. c. 30. s. 1. *The King v. Page*, T. 59 G. 3. 656

## FIERI FACIAS.

See ERROR, 1.  
EXTENT, 1.

## FINE.

See WILL, 1.

1. If the parish of A. be written on an erasure in the deed to lead the uses of a fine, the Court will allow it to be substituted for B. on an affidavit that the latter parish was inserted by mistake, and that the parish of A. was written on the erasure before the deed was executed. *Clennell v. Storer*, H. 59 G. 3. 22
2. A fine levied to pass all lands in the parish of C. is sufficient to comprehend the manor of W. within that parish, although such manor was not mentioned in the fine. *Parker v. Biscoe*, H. 59 G. 3. 24
3. A fine and recovery of *Easter*

Term, 3 Geo. 1. were passed of 100 acres of land, 30 acres of meadow, 50 acres of pasture, and 10 acres of wood. In the deed to lead the uses, the estate was described as containing 170 acres, more or less, and also a mill and lands, containing 14 acres more or less; and, in a prior deed, it was stated to contain 200 acres, more or less. On a recent admeasurement, the estate appeared to contain 209 acres. The Court refused an amendment to increase the quantity of land, according to the late survey, as it exceeded the quantity in the deed to lead the uses; and held, that as the fine and recovery were passed so long since, it was necessary to account for the modern, as well as the ancient possession, and ascertain the successive possessions, and whether the estate had been divided or gone together, since the fine and recovery were passed. *Owen v. Owen*, H. 59 G. 3. 70

4. If there be two *præcipes* to a fine, and the premises be described in the one as manors, tithes, and tenements, and in the other as tenements only, the Court will not allow the fine to pass. *Swinburne v. Swinburne*, E. 59 G. 3. 210
5. If a wrong christian name of the parties to a fine be inserted by mistake, and the right one written on an erasure in the deed to lead the uses, the Court will require an affidavit, to show that such erasure was made, and the name written thereon, before the deed was executed, although the party had signed his right name at the foot of such deed. *De Warre v. Bryan*, E. 59 G. 3. 241

## 774 FRAUDS, STATUTE OF.

6. A warranty of a fine may be amended by altering it from a warranty by the husband and wife, and heirs of the *husband*, against themselves and the heirs of the wife, to a warranty by the husband and wife, and the heirs of the *wife*, against themselves, and the heirs of the wife. *Hannaford v. Pearce*, E. 59 G. 3.

Page 329

### FOREIGNER.

See COSTS, 2. 3. 4. 5.

### FORGERY.

1. An order was made under 48 G. 3. c. 75. s. 6., purporting on the face of it to be an order of a magistrate, on the treasurer of a county, to allow one J. C. the expences of burying a dead body cast on shore:—*Held*: that this was a forgery, although there was no such magistrate in the county, of the name of the person who signed the order, and although J. C. was not therein stated to be a parish officer, or that the expences incurred were necessary. *The King v. Froude*, T. 59 G. 3.

645

### FRAUDS, STATUTE OF.

1. The plaintiff being a merchant abroad, was in the habit of dealing with J. S., and having shipped goods for him to the amount of £1026, and suspecting his solvency, requested the defendant to enter into a guarantie for the payment of the above sum, when he wrote a letter, addressed to the plaintiff, stating, “that J. S. having accepted a bill drawn on him by the plaintiff for £1026, he gave his guarantie for the due payment of the same, in case it

## INDICTMENT.

should be dishonored by the acceptor:”—*Held*: that this was a sufficient agreement within the 4th section of the Statute of Frauds, to bind the defendant for the payment of the goods. *Boehm v. Campbell*, H. 60 G. 3.

Page 15

### FRAUDULENT CONVEYANCE.

See EXECUTION, 1.

### FREIGHT.

See INSURANCE, 1.

### GUARANTIE.

See FRAUDS, STATUTE OF, 1.

### HOUSE OF COMMONS.

See PARLIAMENT, 1.

### HUNDRED.

1. The notice required by the stat. 9 Geo. 1. c. 22. s. 8. to be given to the inhabitants of a hundred, for damage sustained by the burning the plaintiff's barn, must be given to such inhabitants, previous to the party's examination on oath before the magistrate. *Fowler v. The Inhabitants of Loxingborough*, E. 59 G. 3.

319

### HUSBANDRY.

See LANDLORD AND TENANT, 1.

## INDICTMENT.

1. In an indictment against a bankrupt, he was charged in feloniously making default in not submitting to be examined. *Quere*, Whether this is sufficient without charging him with a refusal to

## INSURANCE.

surrender and submit to examination? *The King v. Page*, T. 59 G. 3. Page 656

### INSOLVENT DEBTOR.

See AFFIDAVIT, 2.  
EVIDENCE, 2.  
EXECUTION, 1.  
PRACTICE, 10.

1. If a creditor, previously to the discharge of an insolvent debtor, request him not to include his debt in the schedule, as he would never call for its amount:—*Held*: that if it be omitted in the schedule, the creditor cannot afterwards sue the insolvent for such debt, and it is not necessary to produce a copy of such schedule at the trial. *Carpenter v. White*, E. 59 G. 3. 231
2. The Court will not discharge a defendant on entering a common appearance, on the ground of his having become insolvent, and obtained his certificate at *Newfoundland*, under 49 G. 3. c. 27. s. 8. but will leave him to plead such certificate in bar. *Phillpotts v. Reed*, E. 59 G. 3. 244
3. If a person become insolvent, and obtain his certificate at *Newfoundland* under 49 G. 3. c. 27. s. 8., such certificate may be pleaded in bar to an action brought in this country, for a debt contracted here previous to the insolvency. *Phillpotts v. Reed*, T. 59 G. 3. 623

### INSPECTION OF PAPERS.

See PRACTICE, 15.

## INSURANCE.

1. Freight is insured on ship, and

## JURISDICTION. 775

a cargo of timber from *Quebec* to *London*; the ship sailed from *Quebec*, and on her voyage down the river *St. Lawrence* sprung a leak, when it became necessary, for the preservation of the lives of the master and crew, to run her on shore. She took the ground on the outside of a reef of rocks, and was there fixed and exposed to the full force of the stream, and in the way of the drift ice, then forming and floating down the river. One of the part owners, and agent for the others, resided at *Quebec*, and after two surveys, in which the surveyors stated as their opinion, that it would be prudent to sell the ship and cargo, the master, under the direction of such part owner, sold the same. The ship however survived; was repaired by the purchasers, and afterwards brought a full cargo to *London*. In an action on the policy against the underwriters on freight for a total loss:—*Held first*, that under the circumstances, the master was warranted in selling the ship and cargo: and *secondly*, that an abandonment of the freight was unnecessary. *Idle v. The Royal Exchange Assurance Company*, H. 59 G. 3.

Page 115

### INTEREST OF MONEY.

See PRACTICE, 13.

### INTERROGATORIES.

See PRACTICE, 10.

## JURISDICTION.

See LABOURERS, 1.

## JUSTICE OF PEACE.

See FORGERY, 1.  
HUNDRED, 1.  
LABOURERS, 1.

## LABOURERS.

1. Replevin cannot be maintained for goods distrained by virtue of a warrant from a magistrate who has competent jurisdiction under the statute of Labourers, (20 Geo. 2. c. 19. s. 1.) to issue a warrant of distress and sale on refusal of the party to pay, nor can the question of a magistrate's jurisdiction be tried in such an action; and therefore it cannot be pleaded in bar to a cognizance made under such warrant, that the labourer did not duly make oath before the magistrate, that the sum claimed was due to him for wages, nor that such sum was not due. *Wilson v. Weller, E. 59 G. 3.* Page 294

## LANDLORD AND TENANT.

See COVENANT.  
DISTRESS, 1.  
EJECTMENT.  
LAND TAX, 1.

1. An usage for the off-going tenant of a farm in a particular district, to bestow his work, labour and expence, in manuring, tilling, fallowing, and sowing, according to the course of husbandry, and for the landlord to pay him a reasonable compensation in respect thereof, is a valid and reasonable usage. *Dalby v. Hirst, E. 59 G. 3.* 536

## LAND TAX.

See REPLEVIN, 1.

1. A tenant having paid land-tax and paying rates for six succes-

## LIBEL.

sive years, without claiming any deduction from his landlord for these payments when he paid his rent:—*Held*: that such deduction should be made from the rent of the current year, and that the tenant could not claim it from his landlord at any subsequent period. *Andrew v. Hancock, E. 59 G. 3.* Page 278

## LEASE.

See COVENANT, 1. 3. 4.  
POWER, 1. 2.

## LETTER.

See LIBEL, 1.

## LIBEL.

1. The plaintiff, an attorney, was employed by A. to bring an action against B. The defendant was commissioned to adjust B.'s accounts; and finding that an action was about to be commenced against B. by the plaintiff, wrote a letter to A., blaming him for allowing the plaintiff to sue, and concluded by saying, "If you will be misled by an attorney, who only considers his own interest, you will have to repent it: you may think, when you have once ordered your attorney to write to B. he would not do any more without your further orders; but if you once set him about it, he will go to any length without further orders." In an action for a libel:—*Held*: that it was properly left to the jury whether this letter applied to the plaintiff individually, or to the profession at large, and that it was unnecessary to direct them to find whether it were a confiden-

## MONEY HAD, &c.

tial or malicious communication.  
*Godson v. Home, E. 59 G. 3.*

Page 223

## LIMITATION OF ESTATE.

See DEVISE, 1.

## MAGISTRATÉ.

See JUSTICE OF PEACE.

## MALICIOUS ARREST.

See COSTS, 6. 8. 9.

## MANOR.

See FINE, 1.

## MARRIAGE SETTLEMENT.

See POWER, 2.

## MEMORANDA, 1. 2. 564.

## MODUS.

See TITHES, 1.

## MONEY HAD AND RECEIVED.

See EVIDENCE, 3.

EXTENT, 1.

1. The defendants knowing a check to be post dated, and that the drawers were insolvent, presented it for payment to the plaintiffs, who were bankers, and who, without knowledge of these facts, paid its amount, although they had no funds of the drawers in their hands at the time, but expected some in the course of the day:—*Held*: they were entitled to recover it back, in an action for money had and received.  
*Martin v. Morgan, T. 59 G. 3.*

635

## PAYMENT.

777

## MORTGAGE.

See COVENANT, 3.

## NEW ASSIGNMENT.

See COSTS, 6.

## ORDER OF MAGISTRATE.

See FORGERY, 1.

## OVERSEERS.

See BASTARDY BOND, 1.  
STAMPS, 1.

## PARLIAMENT.

1. An army clothier, who contracts with a colonel of a regiment, or his agents, to furnish clothing for such regiment, is not within the statute 22 G. 3. c. 45, which renders all persons holding contracts for the public service incapable of being elected, or sitting in the House of Commons. *Thomson v. Pearce, E. 59 G. 3.*

Page 260

## PARTITION, DEED OF.

See EJECTMENT, 2.

## PARTNERS.

See BANKRUPT, 1. 6.  
VARIANCE, 4.

## PART-OWNER.

See INSURANCE, 1.

## PAVING RATES.

See LAND TAX, 1.  
REPLEVIN, 1.

## PAYMENT.

See REPLEVIN, 1.



## PAYMENT OF MONEY INTO COURT.

See PRACTICE, 12.

## PERMIT.

See EXCISE, 1.

## PLEADING.

See BAIL BOND.

INDICTMENT, 1.

INSOLVENT DEBTOR, 2. 3.

LABOURERS, 1.

REPLEVIN, 1. 3.

1. In an action of covenant for quiet enjoyment, where *A.* demised by lease to *B.*, who assigned his interest to *C.*, and *C.* to *D.* If *D.* convert the premises assigned to him by *C.* into pleasure grounds, and erect buildings thereon, after the assignment:—*Held*, that he cannot recover the value of the improvements from *B.*, unless he specifically state the special damage in the declaration. *Quære*, Whether he would even then be entitled? *Lewis v. Campbell*, *H.* 59 G. 3.

Page 35

2. In a declaration of covenant, brought by a sheriff against a surety for one of his officers, who had not arrested a person under his warrant, it is necessary to aver that the warrant was delivered by the sheriff to such officer; and it seems that such warrant should have been directed to him. *Des Anges v. Priestley*, *E.* 59 G. 3. 246
3. If a person become insolvent, and obtain his certificate at *Newfoundland*, under 49 G. 3. c. 27. s. 8. such certificate may be pleaded in bar to an action

brought in this country, for a debt contracted here previous to the insolvency. *Phillipotts v. Reed*, *T.* 59 G. 3. Page 623

4. A declaration in *assumpsit* stated, that the plaintiff had sowed divers, to wit, ten acres of land with wheat, and divers, to wit, twenty other acres of land with clover and seeds, and that he had manured, divers, to wit, ten acres of meadow land:—*Held*: that in effect, this was an averment that part of the land was arable, and part meadow land.—*Held also*: that the word “tenant” being used generally in such declaration, applied only to persons occupying farms, as husbandry tenants in the ordinary sense, and not to tenants for lives or in tail. *Dalby v. Hirst*, *E.* 59 G. 3. 536

## POSTEA.

See PRACTICE, 14.

## POWER.

1. Under a power to trustees “to lease premises for a term not exceeding twenty-one years, and determinable as a former term of ninety-nine years was determinable, as they should think proper:—*Held*: that such a power authorised only a lease in possession, and not in *future*; and as the trustees had let the premises for ten years, determinable as in the original lease, and afterwards re-let them for a term of eleven years, before the expiration of the ten years lease, that the second lease was void, and a bad execution of the power. *Staw v. Summers*, *E.* 59 G. 3. 196
2. *A.*, previous to her marriage, by

an indenture, executed pursuant to a power of revocation and appointment of new uses contained in her father's will, settled lands to the use of her intended husband for life, remainder to the use of herself for life, remainder to the use of the issue of the marriage, or of herself by any subsequent marriage; remainder, in default of issue, to such uses as she should appoint, with the ultimate remainder to herself in fee. This deed contained a power for the husband and his intended wife, during their joint lives, to demise such parts of the premises as were then leased for lives, or years determinable on lives, to any person in possession or reversion, for three lives, or years determinable on such lives, so as there were reserved the ancient and accustomed yearly rents, duties, and services, or more, or as great or beneficial, or a just proportion of such rents, &c. according to the value of the premises to be demised (except heriots, which might be varied at will) and so as there were contained in every such lease *a power of re-entry for non-payment of the rent thereby to be reserved.* There was a further power for them to demise any of the premises for any term of years absolute, not exceeding twenty-one years in possession, and not in reversion, so as there were reserved as great and beneficial rents and services as were then paid, or the best and most improved yearly rent that could be obtained for the same, without taking any fine or foregift, so as in every such lease there were contained a clause of re-entry, in case the rents reserved were unpaid by

the space of twenty-eight days. There was a third power for them to demise any of the premises wherein any mines were open, or to be opened, for any term not exceeding thirty-one years in possession, and not in reversion, so as upon every such lease there should be reserved a certain share of the produce, &c. and so as there were inserted therein the usual covenants for insuring the mines and smelting the ore, as were usually inserted in leases of that nature. At the date of the deed of settlement, a tenement, for the recovery of which this action was brought, had been, and was, subject to a lease for a term of years determinable on the lives of three persons, who died before the day of the demise laid in the declaration. By indenture after the marriage, the husband, in consideration of the surrender of the former lease, and of £105, and of the yearly rents, &c. thereafter specified and reserved on the part of the lessees, demised the aforesaid tenement to them for ninety-nine years, if three persons, or any of them should so long live, paying the yearly rent of £2 at Michaelmas and Lady-day, with a couple of fat capons, or 1s. 6d. in lieu thereof; and also an heriot of the best beast, or 40s. in lieu thereof, upon the death of every tenant dying in possession, and the like heriot upon every assignment, sale, &c. and also that the lessees should grind and pay toll for their corn at the lessor's mill. The lease contained a covenant by the lessees, to pay the annual rent of £2, and the other reservations, in manner above limited, "provided always, that if it should

happen during the demise, that the rent of £2, and every or any of the duties, services, reservations, and payments, thereby reserved, or any part thereof, *should be behind, unpaid, or undone, by the space of fifteen days next, over or after any of the days or times whereon the same ought to be paid, done, or performed, and no sufficient distress or distresses, could or might be had or taken on the premises, whereby the same might be fully raised, levied, and paid; or if the lessees should not repair the premises six months after view and notice to repair, or should commit any waste, or grind their corn at any other mill than the lessor's, or assign without license; or if any default should be made by the lessees, in the payment or performance of all or any of the reservations, covenants, and agreements, thereinbefore, on their parts, contained, it might be lawful for the lessor, and the person to whom the freehold of the premises should belong, to re-enter.* At the trial it was proved, that the rents, &c. reserved by the last mentioned indenture were, at the time of making thereof, the ancient and accustomed, and as great and beneficial rents, duties, and services as those which had been reserved at the making the deed of settlement; and that the usual and accustomed form of leases of the tenement in question contained in the settlement for lives, or years determinable on lives, as well prior as subsequent to that settlement, was with a conditional proviso of re-entry, similar to that in the present indenture:—*Held*: that the clause of re-entry in the lease was not

conformable to the leasing power. And it seems that the former leases were not admissible in evidence for the construction thereof. *Doe, d. Jersey (Earl) v. Smith*, E. 59 G. 3. Page 330

## PRACTICE.

See PRISONER, 1.

SCIRE FACIAS, 1.

TRIAL AT BAR, 1.

WARRANT OF ATTORNEY.

1. The Court will not require the attendance of a third person before the prothonotary, in the taxation of a bill of costs, which had been referred to him, to assist a Master in Chancery, to whom the reference had been previously given. *Protheroe v. Thomas*, H. 59 G. 3. 3
2. If a defendant surrender in discharge of his bail, in the vacation after final judgment, the term in which such judgment is signed, is one of the two terms in which the plaintiff must charge him in execution. *Neill v. Lovell*, H. 59 G. 3. 8
3. The Court will not grant a *distringas* to compel an appearance, on an affidavit which stated that the defendant's wife said, that her husband was absent from his house for fear of his creditors; on the ground that the declaration of the wife ought not to prejudice the husband. *France v. Stephens*, H. 59 G. 3. 23
4. If a plaintiff recover a verdict for £5, subject to an order of reference at *nisi prius*, whether such verdict should stand, or be reduced to twenty shillings, and the arbitrator refuse to make an award, the Court will not allow a verdict to be entered for the lesser sum, until such order be

made a rule of Court. *Kirkus v. Hodgson*, H. 59 G. 3. Page 64

5. If a Judge discharge a person who had been arrested, out of custody, under an order, on his undertaking to bring no action, and he afterwards commences one in disobedience of such order, the Court will not interfere to set aside the proceedings, until the order be made a rule of Court. *Jameson v. Raper*, H. 59 G. 3. 65

6. If a declaration against a prisoner in custody be delivered on the last day of the term in which the writ is returnable, the affidavit of the delivery need not be filed till twenty days after the expiration of the following term. *Wood v. Stephens*, E. 59 G. 3. 236

7. A writ of *capias ad respondendum*, directed to the chamberlain of *Chester*, commanding him to take the defendant, is irregular and void; as he is only empowered to issue his mandate to the sheriff for that purpose. *Bracebridge v. Johnston*, E. 59 G. 3. 237

8. The Court will not discharge a defendant, on entering a common appearance, on the ground of his having become insolvent, and obtained his certificate at *Newfoundland* under the 49 G. 3. c. 27. s. 8, but will leave him to plead such certificate in bar. *Philpotts v. Reed*, E. 59 G. 3. 244

9. It is too late for a defendant to move to enter an *exoneretur* on the bail-piece, on the ground of a variance between the declaration and the affidavit to hold to bail, after bail have justified, a plea has been demanded, and time for pleading allowed. *Knight v. Dorsey*, E. 59 G. 3. 305

10. The Court will order interrogatories for the examination of a defendant in custody, by one of the secondaries, which interrogatories must be filed with him. *Arnold v. Edwards*, E. 59 G. 3. Page 817

11. An affidavit, stating that the defendant had been discharged under an Insolvent Debtor's Act, cannot be sworn before his own attorney in the cause. *Jenkins v. Mason*, E. 59 G. 3. 325

12. A defendant cannot apply for costs, under the 43 G. 3. c. 48. s. 3. if he pays a smaller sum into Court than that for which he was arrested, and the plaintiff takes it out and proceeds no further in the action. *Butler v. Brown*, E. 59 G. 3. 327

13. The defendant may refer it to the prothonotary, before judgment, to ascertain what is due for principal and interest on a common money bond. *Bosworth v. Bosworth*, T. 59 G. 3. 590

14. The plaintiff's attorney obtained a *postea* from the associate on the morning of the *quarto die post*, under pretence of having it stamped, but instead thereof signed judgment immediately, and issued execution thereon:—the Court set aside the judgment and execution, and ordered that the associate should not in future deliver over the *postea* until the morning after the *quarto die post*. *Blanchenay v. Vandenberg*, T. 59 G. 3. 643

15. If one part of a deed be executed by the plaintiff alone, but remain in possession of the defendant's attorney, the Court will order him to give an inspection and copy of it to the plaintiff; and the affidavit for such inspection need not set out the

plaintiff's cause of action. *Morrow Saunders, T. 59 G. 3. Page 671*

### PRISONER.

See AFFIDAVIT, 1.  
BAIL, 1.  
PRACTICE, 6.

1. If a defendant be in the original custody of the Court of *King's Bench* for a conspiracy, this Court will not take him out of such custody, in order to surrender him in discharge of his bail. *Bennett v. Kinnear. Currie v. The same, E. 59 G. 3. 259*
2. The Court will order interrogatories for the examination of a defendant in custody, by one of the secondaries, which interrogatories must be filed with him. *Arnold v. Edwards, E. 59 G. 3. 317*

### PROBATE.

See EVIDENCE, 3.

### PROCESS.

See EJECTMENT, 3. 4.  
EVIDENCE, 1.  
PRACTICE, 7.

### PROMISSORY NOTE.

See BILLS OF EXCHANGE.

PROMOTIONS, 1. 2. 564.

### QUIET ENJOYMENT.

See COVENANT, 1. 4.

### RE-ADMISSION OF ATTORNEY.

See ATTORNEY, 1.

### RECEIPT.

See STAMPS, 1.

### RECOVERY.

1. The Court will not allow a recovery to be amended by inserting a parish, if the property in the deed to lead the uses be described as a rectory, although such rectory may extend to more than one parish. — demandant, *Orchard, tenant, Barnes, vouchee, H. 59 G. 3. Page 20*
2. A recovery may be amended by adding a parish, though the recovery was suffered nearly a century ago, if there be general words in the exemplification and deed to make the tenant to the *præcipe*, to warrant the insertion of such parish. *Anonymous, E. 59 G. 3. 326*
3. If the name of a tenant be inserted by mistake for that of the demandant in the body of a warrant of attorney in a recovery, the Court will not allow the warrant of attorney to be amended, or the recovery to pass, although the parties were rightly described in the *præcipe* at the head of such warrant. *Morrell, demandant, Alban, tenant, Hutchett, vouchee, E. 59 G. 3. 495*
4. If a vouchee sign a recovery with one part of his christian name only, the Court will not permit the other part to be added. *Bradley, vouchee, T. 59 G. 3. 577*
5. If a wrong surname of the demandant be inserted by mistake in the warrant of attorney, and subsequent instruments, the Court will allow the recovery to pass on the production of a new warrant of attorney, rectifying such mistake, and on depositing the other instruments with the officer till that time. *Shepherd, demandant, Brewer, tenant, Shepherd, vouchee, T. 59 G. 3. 673*

## REPLEVIN.

### RE-ENTRY:

See POWER, 2.

### REFERENCE TO PROTHO- NOTARY.

See COSTS, 1.

PRACTICE, 13.

### RENT.

See BARON AND FEME, 1.

COVENANT, 3.

DISTRESS, 1.

EJECTMENT, 2.

LAND TAX, 1.

POWER, 2.

REPLEVIN, 1. 3.

### REPLEVIN.

1. To an avowry in replevin for rent in arrear, the plaintiff pleaded in bar, payments for land-tax, and paving rates for six successive years, in order to avoid a distress; and that the sums so paid by him exceeded the amount of the rent distrained for. *Held*: that such a plea was bad on demurrer, as the tax and rates should have been deducted by the plaintiff from the rent of the current year, and as the plea, in substance, amounted, and was equivalent to a set-off. *Andrew v. Hancock, E. 59 G. 3. Page 278*
2. Replevin cannot be maintained for goods distrained by virtue of a warrant from a magistrate who has competent jurisdiction, under the statute of Labourers (20 G. 2. c. 10. s. 1.), to issue a warrant of distress and sale on refusal of the party to pay, nor can the question of a magistrate's jurisdiction be tried in such an action; and therefore it cannot be pleaded in bar to a cognizance made

## SCIRE FACIAS. 783

under such warrant, that the labourer did not duly make oath before the magistrate, that the sum claimed was due to him for wages, nor that such sum was not due. *Wilson v. Weller, E. 59 G. 3. Page 294*

3. To a declaration of replevin for taking the plaintiff's goods, the defendant made cognizance, as bailiff of an executrix, under 32 H. 8. c. 37. for arrears of rent incurred in the life-time of the testator:—*Held*: that such avowry need not set out the title of the testator, or show the executrix was entitled to distrain under that statute, and that, at all events, it could not be objected to after verdict. *Martin v. Burton, T. 59 G. 3. 608*

### REPUTED OWNER.

See BANKRUPT, 7.

### RIGHT, WRIT OF.

See SHERIFF, 3.

### RULE OF COURT.

See PRACTICE, 4. 5.

### SALE.

See EXECUTION, 1.

EXTENT, 1.

LABOURERS, 1.

### SCIRE FACIAS.

1. The plaintiff, in vacation, obtained the signature of a Serjeant, to a motion paper to issue a *scire facias* against the defendant, on a judgment more than ten years old. To this writ the sheriff returned *nil*, and the defendant had no personal or other notice of the writ's having issued, al-

though he resided in the sheriff's bailiwick:—After the return, the plaintiff signed judgment:—*Held*: that such judgment was irregular, as the writ should have been issued on a motion to the Court in term time, and the defendant should have had personal notice thereof. *Lowe v. Robins*, T. 59 G. 3. Page 757

### SECURITY FOR COSTS.

See COSTS.

### SET-OFF.

See REPLEVIN, 1.

### SETTING ASIDE PROCEEDINGS.

See PRACTICE, 5. 14.

### SLANDER.

See LIBEL, 1.

### SHERIFF.

See EXTENT, 1.

PRACTICE, 7.

1. In an action against a sheriff for returning *nulla bona* to a *feri facias*, which had been lodged with him at seven o'clock in the evening to be levied, and no writ of error had been allowed at half past six on the evening of that day:—*Held*: that the sheriff should not have returned *nulla bona*, but that a writ of error had been allowed, and that therefore the plaintiff was entitled to recover nominal damages. *Cleghorn v. Des Anges*, H. 59 G. 3. 83
2. In a declaration of covenant brought by a sheriff against a surety for one of his officers, who had not arrested a person under his warrant, it is neces-

sary to aver that the warrant was delivered by the sheriff to such officer; and it seems that such warrant should have been directed to him. *Des Anges v. Priestley*, E. 59 G. 3. Page 246

3. To a writ of summons on a writ of right, the sheriff returned that he had caused four knights to be summoned; at the bottom of which, and before the return was made, the officer of the Court had indorsed that they were duly sworn:—*Held*, that such indorsement formed no part of the sheriff's return:—*Held*, also, that the sheriff, being commanded by the writ to summon such knights, was not guilty of negligence in omitting to have them sworn, nor was he bound to execute such writ before the commission day of the assizes, but might summon the knights from the grand Jury when present at such assizes. *Windle v. Ricardo*, E. 59 G. 3. 249

### SPERATE DEBTS.

See EXECUTOR, 1.

### STAMPS.

1. An instrument given by an overseer of the poor to the reputed father of a bastard child, stating, that he had received a sum of money from the latter by a bill of exchange, payable after date, and which, when paid, would exonerate him from the expences attending the birth and maintenance of such child, does not require an agreement stamp within 55 G. 3. c. 184, schedule, part 1; but a receipt stamp is sufficient for such a document. *Watkins v. Hewlett*, E. 59 G. 3. 211

STATUTES—CITED OR COMMENTED ON.

*Edward 1.*

33. c. 5. Forests. Page 583

*Henry 6.*

8. c. 12. Amendment. 496

*Henry 8.*

21. c. 15. Feigned Recoveries. 505

32. c. 28. Leases—Tenants in Tail. 450

32. c. 37. s. 1. Distress, Executors. 610

*Edward 6.*

2. & 3. c. 13. s. 1. Tithes. 216

*Elizabeth.*

5. c. 4. Rating of Wages. 299  
300

13. c. 5. Fraudulent Conveyance. 14

13. c. 7. Bankrupt. 111. 164. 176

*James 1.*

1. c. 6. Wages. 299

1. c. 15. Bankrupt. 160 to 184

21. c. 19. Bankrupt. 13. 173

———— s. 11. 595

———— s. 8. 614

———— s. 2. 665

*Charles 2.*

29. c. 3. s. 4. Frauds, Statute of. 19

*William 3.*

8. & 9. c. 11. Costs—Assignment of Breaches. 687

*Anne.*

6. c. 2. Registry of Deeds. 173

8. c. 14. ss. 6. & 7. Distress—Rent— 611

9. c. 10. s. 16. Foreign Letters—Forgery. Page 684

9. c. 14. Gaming. 110

*George 1.*

9. c. 22. Black Act. 323

*George 2.*

2. c. 25. Forgery—Receipt. 650

4. c. 28. Distress—Rent. 397 to 474

5. c. 30. s. 40. Bankrupt. 88

———— ss. 1. & 26. Bankrupt— 167, 177

———— s. 7. Bankrupt. 244

———— s. 1. Bankrupt. 656. 663 to 671

———— s. 14. Bankrupt. 670

7. c. 22. Forgery. 647, 8. 650

11. c. 19. s. 8. Distress. 96. 110

———— s. 14. Use and Occupation. 312, 13

17. c. 5. s. 5. Forgery—Vagrants. 650, 1

19. c. 32. s. 1. Bankrupt. 166. 174. 6. 184

20. c. 19. s. 1. Labourers. 294. 297. 8. 9. 302, 3, 4

24. c. 44. s. 6. Magistrate—Jurisdiction. 302

31. c. 42. Black Act. 319

*George 3.*

13. c. 84. General Turnpike Act. 189

17. c. 30. Forgery. 649

19. c. 62. Manure—Tolls. 189

22. c. 45. Parliament. 260, 1. 6. 7. 272

26. c. 59. Excise Permit. 217, 8, 9

31. c. 29. Newfoundland Jurisdiction. 244

32. c. 34. Seamen. 652

32. c. 46. Newfoundland. 244

33. c. 76. Newfoundland. 244

38. c. 5. Land-tax. 281

43. c. 46. Costs—Malicious Arrest. 327. 540, 1. 643. 695



46. c. 65. Property Tax. *Page* 281  
 46. c. 135. Bankrupt. 163. 6.  
                   173. 5. 7. 184  
 47. c. 91. Turnpike Tolls. 187, 8, 9  
 48. c. 75. Forgery. 645. 7, 8  
 49. c. 27. Insolvent — *Newfound-*  
           *land.* 244, 5. 623. 5. 7. 633  
 49. c. 121. Bankrupt. 163 to 168.  
                   175. 177. 526. 601.  
 53. c. 102. Insolvent Debtors.—  
                   231, 2, 3. 5. 325  
 54. c. 170. Bastardy Bond. - 21  
 55. c. 184. Stamps. 211, 12, 13.  
                   638

## SUBPENA.

See ATTACHMENT, 1.  
 WITNESS, 2.

## SUPERSEDEAS.

See ERROR, 1.

## TAXES.

See LAND TAX, 1.

## TENANT IN COMMON.

See EJECTMENT, 2.

## TITHES.

1. In an action for not setting out tithes, where the defendant had been under a pecuniary composition with the plaintiff:—*Held*: that parol evidence of the defendant, stating his refusal to pay, and that there was a *modus* in the parish, and denying the plaintiff's right to take tithes, is sufficient to determine such composition, without any agreement or notice for that purpose. *Bower v. Major*, *E. 59 G. 3.* 216
2. The right of a parson to the tithes of calves and lambs accrues when they are dropped; but they are not titheable until

## TRESPASS.

they have arrived at a proper age to be weaned. *Welch v. Uppill*, *E. 59 G. 3.* *Page* 330

## TOLLS.

1. A clause in a turnpike act exempted from toll all carriages employed in the conveyance of materials for repairing the road, or any of the highways, in the parishes in which any part of the road lay: and in a subsequent part, exempted generally carriages employed in conveying implements of husbandry or manure; in the following clause the trustees were empowered to compound with persons who resided in one parish, and occupied lands in an adjoining parish. The plaintiff's waggon was passing on the road, laden with lime, from one parish to another, for the purpose of the cultivation of his farm, situate in the latter, neither of which were situate in any of those parishes through which the road passed:—*Held*: that this being an exemption in the former clause in favour of husbandry, was to be beneficially construed, and that it was not restrained by the subsequent one: and that, consequently, the plaintiff was not liable to the payment of toll. *Hickinbotham v. Perkins*, *H. 59 G. 3.* 186

## TRESPASS.

See COSTS, 7.

## TRIAL AT BAR.

1. An action of trespass *quare clausum fregit* is maintainable by a tenant from year to year, who had become bankrupt after the committing the trespass, and before the commencement of the

## **. TROVER.**

suit; and the right of such action does not pass to the assignees by the assignment, unless they interfere: as the bankrupt may sue as a trustee for, and has a good title against all persons but them. *Clark v. Calvert*, *H. 59 G. 3.* Page 96

2. An uncertificated bankrupt cannot maintain an action of trespass against subsequent creditors, for breaking open his house, and seizing his after-acquired property, although his assignees do not ratify the seizure, and although they were unknown to the defendants until after the commencement of the action. *Hull v. Pickersgill*, *T. 59 G. 3.*

612

## **TRIAL AT BAR.**

1. In trespass for breaking and entering the plaintiff's chase, and killing his deer; the Court will not grant a trial at bar, although the question to be tried was to ascertain the boundaries of the chase; and although ancient and documentary evidence, as well as considerable living testimony, was necessary to fix such boundaries; on the ground, that a case involving similar rights had been lately brought by the same plaintiff against another defendant, in which the latter had obtained a verdict, and which the Court of *King's Bench*, after argument, had refused to set aside, or grant a new trial. *Lord Rivers v. Pratt*, *T. 59 G. 3.* 582

## **TROVER.**

See **BANKRUPT**, 7.

## **TRUST DEED.**

See **EXECUTION**, 1.

**VOL. III.**

## **VARIANCE.**

797

## **TRUSTEES.**

See **EXECUTION**, 1.  
**POWER**, 1.  
**TOLLS**, 1.  
**TRESPASS**, 1.

## **TURNPIKE.**

See **TOLLS**, 1.

## **USAGE.**

See **LANDLORD AND TENANT**, 1.

## **USE AND OCCUPATION.**

See **BARON AND FEME**, 1.

## **VARIANCE.**

See **PRACTICE**, 9.

1. If a bankrupt be described in a commission as a dealer in cattle only; evidence cannot be adduced to prove that he was a dealer in hops. *Hale v. Small*, *H. 59 G. 3.* Page 58
2. If in a joint and several note, payable by instalments, the day on which one of the instalments becomes payable, be mis-stated in the declaration, it is a fatal variance; and if the defendant sign such note as a surety for the other maker, the plaintiff cannot resort to the common money counts. *Wells v. Girling*, *H. 59 G. 3.* 79
3. A declaration on a bail-bond, in setting out the condition, stated, that if the defendant should appear to answer the plaintiff, "according to the custom of his Majesty's Court of Common Bench here," the obligation should be void. On the production of the bond the former words were omitted. *Held*: that this was no variance, as it was only necessary

- to set out the condition according to its legal effect. *Bonfellow v. Steward, E. 59 G. 3. Page 214*
4. Six partners entered into two bonds of submission to arbitration; in the one, three gave a joint and several bond to the other three, conditioned for the due performance of the award, and the three latter gave a similar bond to the three former. In the recital of the bonds, the differences were stated to be depending between the above boun- den three, and the above named three; in setting out the bond in the declaration, the differences were laid to be depending be- tween the six partners collec- tively. This is no variance. *Win- ter v. White, T. 59 G. 3. 674*

### VERDICT.

See PRACTICE, 4.

### WARRANT.

See COVENANT, 2.  
LABOURERS, 1.

### WARRANT OF ATTORNEY.

See RECOVERY, 3. 5.

1. In order to obtain leave to enter up judgment on an old warrant of attorney, the affidavit must state that the defendant was alive on a day within the term in which the application is made. *Hamley v. Allaston, T. 59 G. 3. 606*

### WILL.

See DEVISE.  
EVIDENCE, 3.

1. A fine levied by a testator sub- sequent to his will, operates as a

- revocation of such will. *Parker v. Biscoe, H. 59 G. 3. Page 24*
2. A. by will, devised all his real estates, save and except certain copyhold estates therein men- tioned, in trust, for his eldest son, with remainder to preserve contingent remainders, with re- mainder to the male issue of his son in tail male, with remainder over; and afterwards made a co- dicil, whereby, after reciting that by the death of his brother he had become entitled for life to certain estates mentioned in the will of J. S. he revoked the li- mitation in his will, so far as it related to his estates in favour of his son, and declared that a pro- vision, contained in his will for that purpose, should be extended so as to comprehend the estates limited by the will of his brother, as well as those limited by the will of J. S. and for preventing the estates mentioned in his will from going with those limited by the will of his brother, as was provided in his will, as to the estates limited by the will of J. S.—*Held:* that such codicil did not amount to a republication of his will; neither did it amount to a devise by implication, or a confirmation of a devise of lands contained in his brother's will. *Parker v. Biscoe, H. 59 G. 3. 24*

### WINE.

See EXCISE, 1.

### WITNESS.

See BANKRUPT, 7.

1. The Court will not grant an at- tachment against a witness for disobedience to a subpoena, un-

## WITNESS.

less the affidavit state, that he was duly called at the trial. *Malcolm v. Ray, E. 59 G. 3.*

Page 222

2. But a witness is liable to an attachment, if, after a subpoena served on him, he attend in Court, and during the opening of the plaintiff's cause, thinking he is not liable to prove a particular fact, he leave the Court, and the plaintiff is nonsuited for want of evidence. *Malcolm v. Day, E. 59 G. 3.* 579

3. In an action of trover, brought

## WRIT OF RIGHT. 789

by the assignees of a bankrupt for a rick of bark, and of which the bankrupt was the reputed owner, a witness may be asked, what was the reputation of the neighbourhood to whom the rick belonged at the time of the bankruptcy, if it appear that the bankrupt had exercised repeated acts of ownership over it previous to that time. *Oliver v. Bartlett, T. 59 G. 3.* Page 582

## WRIT OF RIGHT.

See SHERIFF, 3.

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